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No. ——

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In the Supreme Court of the United States

NISSAN MOTOR ACCEPTANCE CORPORATION,
Petitioner,

v.

LEONARD APPLEBAUM,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Consumer Leasing Act, 15 U.S.C. §1667a, requires that the amount or method of determining any early-termination charges in an automobile lease be disclosed "in a clear and conspicuous manner . . . ."

The question presented is whether the court of appeals erred in interpreting this statutory provision and accompanying regulations to require disclosure of a specific number used in calculating an early-termination charge, thus

(a) altering the Federal Reserve Board's focus on the "manner" and "form" of the required disclosures;

(b) imposing a substantive requirement not adopted by the agency charged with administering the statute; and

(c) bringing the Third Circuit into conflict with the Seventh Circuit, which has ruled in a similar case that "only the method, and not the way the method works, needs to be disclosed."

LIST OF INTERESTED PARTIES

Under this Court's Rule 29.6, petitioner Nissan Motor Acceptance Corporation ("NMAC") states: The parties to the proceeding below were NMAC, Reitenbaugh Enterprises, Inc., and Leonard Applebaum. NMAC is a subsidiary of N.N.A., Inc., ("NNA"), which is also known as Nissan North America, Inc. NNA is a subsidiary of Nissan Motor Company, Ltd., Japan. Renault S.A., of France, owns more than 10% of Nissan Motor Company, Ltd., Japan.

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PETITION FOR A WRIT OF CERTIORARI

Nissan Motor Acceptance Corporation ("NMAC"), by its undersigned counsel, respectfully petitions for a writ of certiorari to review the judgment of the court of appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 226 F.3d 214. The opinion of the district court (App. B) is not formally reported, but can be found at 1999 WL 236601.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2000. A petition for rehearing was denied on October 25, 2000 (App. C). On January 12, 2001, Justice Souter granted an application to extend the deadline for filing

this Petition to and including March 23, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The Consumer Leasing Act ("CLA") states in relevant part:

> **§1667a. Consumer lease disclosures**
>
> Each lessor shall give a lessee prior to the consummation of the lease a dated written statement on which the lessor and lessee are identified setting out accurately and in a *clear and conspicuous manner* the following information with respect to that lease, as applicable:
>
> * * * * *
>
> (11) A statement of the conditions under which the lessee or lessor may terminate the lease prior to the end of the term and the amount or method of determining any penalty or other charge for delinquency, default, late payments, or early termination.

15 U.S.C. § 1667a(11) (1994) (emphasis added).

The version of the Federal Reserve Board's Regulation M that was in effect at the time that the leases at issue were executed, provided in pertinent part:

> **§ 213.4 Disclosures**
>
> (a) *General requirements.* (1) Any lessor shall, in accordance with this regulation and to the extent applicable, make the disclosures required by paragraph (g) of this section with respect to any consumer lease. Such disclosures shall be made *clearly, conspicuously, in meaningful sequence*, and in accordance with the further requirements of this section. All numerical amounts and percentages shall be stated in figures and shall be printed in not less than the equivalent of 10-

> point type, .075 inch computer type, or elite size typewritten numerals, or shall be legibly handwritten.
>
> * * * * *
>
> (g) *Specific disclosure requirements.* In any lease subject to this section, the following items, as applicable, shall be disclosed:
>
> * * * * *
>
> (12) A statement of the conditions under which the lessee or lessor may terminate the lease prior to the end of the lease term and the amount *or method* of determining the amount of any penalty or other charge for early termination.

12 C.F.R. §213.4 (1995) (emphasis added).

The Federal Reserve Board's Official Staff Commentary on the meaning of the phrase "clearly, conspicuously and in meaningful sequence" stated as follows:

> *Clearly, conspicuously and in meaningful sequence.* This standard requires that disclosures be *in a reasonably understandable form.* For example, while the regulation requires no particular mathematical progression or format, the disclosures must be presented in a way that does not obscure the relationship of the terms to each other. . . . The requirement that disclosures be made clearly and conspicuously does not mean that they must be more conspicuous than other terms in a combined contract-disclosure statement, nor does it preclude the use of a multi-purpose disclosure form that enables the lessor to designate the specific disclosures applicable to a given transaction.

12 C.F.R. Pt. 213, Supp. I, §213.4(a)(1) cmt. 1, at 368 (1995) (emphasis added).

STATEMENT OF THE CASE

A. Introduction

This case concerns the disclosures that a lessor must make in an automobile lease under the Consumer Leasing Act

("CLA"), 15 U.S.C. §§1667-1667f (1994 and Supp. V 1999), and the regulations promulgated under that statute. Respondent filed suit in the United States District Court for the Eastern District of Pennsylvania, alleging that the early-termination clauses in NMAC's leases violated the disclosure requirements of the CLA and the Federal Reserve Board's Regulation M. The district court had jurisdiction pursuant to 28 U.S.C. §1331.

On cross motions for summary judgment, the district court held that NMAC's leases complied with the disclosure requirements of the CLA and Regulation M, and accordingly granted summary judgment for NMAC. App. 31a. The court of appeals reversed, holding that, to comply with the statute and regulations, NMAC was required to disclose a specific number used in calculating the early-termination charge under the lease. By ruling that the substantive content of CLA disclosures must be "reasonably understandable" to consumers, the court of appeals adopted a reading of the CLA and Regulation M that departs from the Federal Reserve Board's focus on the "manner" and "form" of the disclosures. The court of appeals' holding also conflicts with the Seventh Circuit's decision in a similar case, which held that the CLA's disclosure requirements govern "the mode of presentation, not the degree of comprehension."

B. Factual Background

In November 1994, respondent Leonard Applebaum executed a three-year lease (the "1994 Lease") for a 1995 Nissan Maxima with Reitenbaugh Enterprises, Inc., an automobile dealer in Pennsylvania. Reitenbaugh assigned the 1994 Lease to NMAC. App. 3a.

In January 1997, Applebaum terminated the 1994 lease, to trade in his old car for a 1997 Nissan under a new lease (the "1997 Lease"). Reitenbaugh informed Applebaum of the charges associated with the early termination of the

1994 Lease. App. 3a. Applebaum arranged to have the termination charges incorporated into the financed amount due under the 1997 Lease, which he proceeded to execute. *Id.* at 4a.

Both leases contained an early-termination provision that disclosed the method for determining the charge for early termination. The early-termination provision in the 1994 Lease provided:

> [I]f I terminate early, in addition to the above charges, I must pay you an Early Termination Charge which is determined as follows: First, all monthly lease payments, which under the terms of my lease, are not yet due and the residual value of the vehicle are discounted to present value by the Constant Yield Method at the rate implicit in the lease (the "Adjusted Balance"). This amount is then reduced by the Realized Value (and insurance) proceeds which you receive for the vehicle. The balance due you is the Early Termination Charge which I will pay to you immediately. If there is an excess, however, you will not refund it to me.

App. 3a.[1] Respondent claims that this language does not satisfy the disclosure requirements in the CLA and Regulation M. In particular, Applebaum claims that the early-termination provision violates the CLA's "clear and conspicuous manner" requirement because it uses the term "residual value" without defining the term or disclosing the amount of "residual value" assigned to the vehicle that Applebaum leased.

C. Statutory and Regulatory Background

The CLA and its implementing regulations (Regulation M) require lessors to make certain disclosures regarding the terms of commercial leases. The CLA was passed in 1976 as an amendment to the Truth in Lending Act ("TILA"), 15

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[1] The language of the early-termination provision in the 1997 Lease is substantially similar to that in the 1994 Lease. *Id.*

U.S.C. §§ 1601 *et seq.*, largely in response to an increase in the practice of automobile leasing.[2] Like the TILA, the purpose of the CLA is "to assure a meaningful disclosure" of personal property lease terms to "enable the lessee to compare more readily the various lease terms available to him . . . ." 15 U.S.C. §1601(b). To that end, the CLA requires the lessor to provide the lessee with a written statement that sets forth in "a clear and conspicuous manner" the key terms of the lease, including the circumstances under which either party will be permitted to terminate the lease early, and the "amount or method of determining any penalty or other charge for . . . early termination." 15 U.S.C. §1667a(11).

Congress granted the Federal Reserve Board "expansive authority" to promulgate regulations under the TILA and the CLA. *See Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559-60 (1980); 15 U.S.C. §§ 1604, 1667f; *Channell v. Citicorp Nat'l Servs., Inc.*, 89 F.3d 379, 381 (7th Cir. 1996). Regulation M, codified at 12 C.F.R. Part 213, implements the disclosure requirements established by the CLA. At the time the leases at issue in this case were executed, the Regulation M provision regarding early termination was virtually identical to that contained in the statute itself. *See* 12 C.F.R. §213.4(g)(12) (1995) (requiring disclosure of the "amount or method of determining the amount of any penalty or other charge for early termination"). According to Regulation M, this early-termination disclosure, like the other disclosures required by the CLA, was to be made "clearly, conspicuously, [and] in meaningful sequence . . . ." 12 C.F.R. §213.4(a)(1). Thus, Regulation M took the statutory phrase "in a clear and conspicuous manner" and added the gloss of requiring that the statutory disclosures be made "in meaningful sequence."

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[2] A leading industry publication reported that 1.9 million automobile leases were entered in the United States in 1996. J. Henry, *Survey Finds Leasing Up Sharply in 1996*, Automotive News, June 23, 1997, at 16.

The Federal Reserve Board also published an Official Staff Commentary to the Board's Regulation M. Explicating the phrase "clearly, conspicuously and in meaningful sequence," the Commentary stated that the required disclosures must be "in a reasonably understandable form." Elaborating further, the Commentary explained that, "while the regulation requires no particular mathematical progression or format, the disclosures must be presented in a way that does not obscure the relationship of the terms to each other." 12 C.F.R. Pt. 213, Supp. I, §213.4(a)(1) cmt. 1, at 368 (1995). Thus, the Commentary, through its use of the phrase "in a reasonably understandable form," continued the statutory and regulatory focus on the "manner" or the "form" in which the required disclosures were made.

Several courts construing these disclosure provisions, including the courts below, have recognized that early-termination provisions often involve complex mathematical calculations that are beyond the understanding of the average consumer. The courts have held that the CLA and Regulation M do *not* require that the lease disclosures enable the average consumer to understand or perform the calculation described in the early-termination clause. App. 11a, 28a; *Channell v. Citicorp Nat'l Servs., Inc.*, 89 F.3d at 382. *But see Lundquist v. Security Pacific Automotive Financial Servs.*, 993 F.2d 11, 15 (2d Cir.) (holding that the early-termination disclosures in an automobile lease violated the CLA because they were "confusing, unduly complicated, and unnecessarily convoluted" and "beyond the understanding of the average consumer"), *cert. denied*, 510 U.S. 959 (1993).

"Residual value," one of the terms used in the early-termination provision of the leases at issue here, is a term with established meaning in the leasing field. App. 15a. It has recently been defined as "[t]he end-of-term value of the vehicle established at the beginning of the lease and used in calculating your base monthly payment." *Id.* (quoting Federal Reserve Board's web page). Before 1996, neither the CLA

nor Regulation M expressly defined the term "residual value" or required that the term be defined or its amount disclosed in an automobile lease. App. 28a. In 1996, the Federal Reserve Board revised Regulation M to define "residual value" and to require a lessor to disclose the amount of the residual value when that quantity is used in calculating a payment under the lease. 12 C.F.R. §213.4(f)(4) (1998). The revised version of Regulation M defines "residual value" to mean "the value of the leased property at the end of the lease term, as estimated or assigned at consummation by the lessor, used in calculating the base periodic payment." 12 C.F.R. §213.2(n) (1998). Although these amendments became effective on October 31, 1996, compliance was not mandatory until January 1, 1998, and they do not govern the leases at issue in this case. 62 Fed. Reg. 51,006 (1997); 61 Fed. Reg. 52,246 (1996).

Prior to the 1996 amendments, Regulation M specifically required disclosure of the residual value in an open-end lease, 12 C.F.R. §213.4(g)(15) (1995), but it contained no such requirement for a closed-end lease, such as the leases at issue here.[3] *See* 61 Fed. Reg. 52,246, 52,251 (1996). By promulgating a regulation requiring disclosure of the residual value in certain circumstances, the Federal Reserve Board demonstrated its awareness that the term "residual value" was being used in automobile leases, but the Board stopped short of requiring disclosure of the residual value amount in circumstances like those presented here.

There is a further relevant aspect of the regulatory scheme. Under 15 U.S.C. §1604(b)—and, since 1996, under 15 U.S.C. §1667f(b) as well—Congress directed the Federal Reserve

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[3] An open-end lease is one in which the lessee's liability at the end of the lease term is based on the difference between the residual value of the leased property and its realized value. *See* 12 C.F.R. §213.2(i) (1998). In a closed-end lease, by contrast, the consumer is not liable for the difference between the residual and the realized value at the end of the lease term. 61 Fed. Reg. 52,246 (1996).

Board to "publish model disclosure forms and clauses for common transactions to facilitate compliance" with the statutory disclosure requirements. Section 1604(b) provides that a lessor that properly uses the model form published by the Board "shall be deemed to be in compliance" with the statutory disclosure requirements.[4] *See Turner v. General Motors Acceptance Corp.*, 180 F.3d 451, 458 (2d Cir. 1999) ("proper use of the model forms published by the FRB represents *per se* compliance with the regulation").

As relevant here, the applicable model form at the time of the leases at issue contained only a single line: "The charge for such early termination is _____." 12 C.F.R. Pt. 213, App. C, Form C-2, at 357 (1995). The form said nothing about residual value, and it did not include any line item or other space in which the amount of the residual value was to be placed. By contrast, after the 1996 amendments to Regulation M, the Board adopted a revised model form that explicitly calls for the disclosure of the dollar amount of the residual value. *See* 12 C.F.R. Pt. 213, App. A, Form A-2, at 367 (1998).

D. Proceedings in the District Court

After executing the 1997 Lease, Applebaum filed this action against NMAC and Reitenbaugh, alleging that the early-termination provision of the leases violated the CLA (1) because it used terms such as "constant yield method" and the

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[4] The relevant sentence of Section 1604(b) states:

> A creditor or lessor shall be deemed to be in compliance with the disclosure provisions of this subchapter with respect to other than numerical disclosures if the creditor or lessor (1) uses any appropriate model form or clause as published by the Board, or (2) uses any such model form or clause and changes it by (A) deleting any information which is not required by this subchapter, or (B) rearranging the format, if in making such deletion or rearranging the format, the creditor or lessor does not affect the substance, clarity, or meaningful sequence of the disclosure.

"rate implicit in the lease" without further explanation, and (2) because it failed to define or disclose the amount of the leased vehicle's "residual value." The district court granted summary judgment for defendants, relying in part on the Seventh Circuit's opinion in *Channell v. Citicorp Nat'l Servs., Inc.*, 89 F.3d 379 (7th Cir. 1996). After reviewing the statutory language at issue, as well as the language of Regulation M and the 1994 Official Staff Commentary, the district court concluded that the CLA and Regulation M require "clarity and full presentation of terms, not full presentation of the details or formulation of a mathematical equation." App. 24a. The court rejected respondent's argument that the CLA disclosures must be within the comprehension of the average consumer, explaining that, to comply with the statute and regulation, the disclosures need only be "visible to the lessee and in a readable format"; they need not be "simple enough to do the mathematical calculations of the exact amount." *Id.* The court emphasized that "[t]he CLA does not require the lessor to explain complex mathematics in the lease; stating the method used satisfies the disclosure requirement." *Id.* at 28a.

Applying these principles to the early-termination provision in the NMAC leases, the court found that the leases complied with the statute and regulation. The court explained that the "lease provision states each step in the calculation of the early termination charge," allowing a lessee to determine the formula or method by which the charge would be calculated. App. 27a. Although the average consumer may not understand the meaning of terms such as "constant yield method," the court found that the method was "well known in the industry," and the court therefore ruled that the CLA required no more than that the lessor identify it by name. *Id.*

The court also held that the lessor was not required to define the term "residual value" as used in the early-termination provision, noting that, at the time the leases were executed, Regulation M specifically required a definition of

"residual value" only in an open-end lease, and not in a closed-end lease such as the leases involved in this case. App. 28a (citing 12 C.F.R. §213.4(g)(15) (1995)). Relying on this Court's statement in *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980), that "caution must temper judicial creativity in the face of legislative or regulatory silence," the district court declined to read into the CLA and Regulation M a requirement that "residual value," a concept familiar to the Federal Reserve Board, be defined in early-termination provisions in leases other than those in which the Board explicitly required such disclosure. App. 28a, 29a.

E. The Court of Appeals' Decision

The court of appeals reversed the district court's grant of summary judgment, and remanded with instructions to enter judgment for Applebaum. The court agreed that the leases' failure to define the terms "constant yield method" and "rate implicit in the lease" did not violate the CLA's disclosure requirements. The court ruled, however, that NMAC was obliged to disclose, in the early-termination provision of the lease, the amount of residual value that had been assigned to Applebaum's car. App. 15a. The court so held despite its recognition that (1) the CLA and Regulation M do not require lease terms to be within the comprehension of the average consumer, *id.* at 11a; (2) "[r]esidual value, like the constant yield method, is a term with an established meaning in the leasing field," *id.* at 15a; and (3) neither the CLA nor Regulation M specifically required a definition or description of the term "residual value," *id.* at 12a. Notwithstanding these facts, the court ruled that the leases violated the CLA because the early-termination clause, by failing to tie a specific number to the term "residual value," was not "'reasonably understandable' in any meaningful sense of the term." *Id.* at 15a.

The words "reasonably understandable" do not appear in the statute or in Regulation M. The words do appear in the

Official Staff Commentary to Regulation M, but only as part of a longer phrase, which the Commentary derives from the statutory "clear and conspicuous manner" standard, and from Regulation M's resulting requirement that disclosures be made "clearly, conspicuously, and in meaningful sequence." According to the Commentary, this statutory and regulatory language means that the CLA disclosures must be made "in a reasonably understandable form." The Commentary thus does not use the words "reasonably understandable" in a vacuum but rather as a modifier of the word "form." Taken in context, the Commentary's statement does not impose any new substantive disclosure requirement but rather merely restates in different words the statutory and regulatory focus on the "manner" in which the required disclosures are made. The Commentary's reference to the "form" of the CLA disclosures is consistent with the Seventh Circuit's ruling in *Channell* that the CLA's "clear and conspicuous manner" requirement "refers to the mode of presentation" and means "visible, not simple." 89 F.3d at 382. Here, however, the court of appeals rejected *Channell*'s interpretation, holding that "disclosure of the method of calculating an early termination penalty must not only be legible, it must also be 'reasonably understandable'." App. 11a.

The court treated the Federal Reserve Board's decision specifically to require disclosure of the residual value in open-end leases but not in closed-end leases as insignificant. The court identified what it regarded as a "critical difference" between open-end and closed-end leases, and it said that this difference removed any significance from the Board's different regulatory requirements for the two kinds of leases. App. 16a-17a. In an open-end lease, the court explained, the lessee's liability at the end of the lease is based upon the difference between the residual value of the leased property and its realized value, and thus "residual value is always relevant to a lessee's liability in an open-end lease . . . ." *Id.* By contrast, the court said, closed-end leases sometimes do

not use the residual value concept at all. The court concluded, therefore, that "the Board's failure specifically to require the disclosure of residual value in closed-end leases cannot reasonably be interpreted as a considered decision that disclosure is not necessary to make a closed-end lease reasonably understandable if it uses that term." *Id.* at 17a. Turning to the NMAC leases at issue, the court held that, because the leases used the concept of residual value as a component in calculating the early-termination charge, the lessor was required to disclose the amount of that value. *Id.*

REASONS FOR GRANTING THE PETITION

This case presents important issues regarding the disclosures that a lessor must make in an automobile lease under the CLA and Regulation M, and the extent to which those disclosures should be prescribed by federal courts rather than by Congress and by the Federal Reserve Board, the agency charged with the responsibility to implement this complex statutory and regulatory scheme. The court of appeals made a fundamental error in departing from and augmenting the CLA's focus on the "manner" of disclosure, in favor of imposing a new substantive requirement—the amount of a vehicle's residual value—of the court's own devising. The court adopted this new requirement even though it was not contained in the Board's own model form for compliance with the CLA. Concentrating not on the language of the statute or Regulation M, the court emphasized instead the Official Staff Commentary, and it then subtly but significantly altered even the Commentary's language, asking not whether the CLA disclosures were "in a reasonably understandable form," but whether they were "reasonably understandable." The court thus substituted its judgment for that of the Federal Reserve Board, and it did so in a manner that is directly at odds with the Seventh Circuit's approach in *Channell v. Citicorp Nat'l Servs., Inc.*, 89 F.3d 379 (7th Cir. 1996).

Although the Regulation M amendments, as of January 1, 1998, require disclosure of the residual value amount in closed-end leases when that amount is used in calculating periodic payments under the lease, the court of appeals' decision remains enormously significant, both for existing leases and prospectively. In the first place, there are hundreds of thousands of leases that remain in effect or that are the subject of pending litigation that will be affected directly by the court of appeals' ruling.[5] More important, the court's decision will increase substantially the cost and uncertainty of complying with the CLA and Regulation M in the future. Even in circumstances like those presented here, where the Federal Reserve Board has explicitly required a certain disclosure in some situations but not in others, lessors subject to the statute will not be able to conclude with any confidence that the disclosure is required only when the Board says it is. Instead, they will need to attempt to predict when a reviewing court might conclude, notwithstanding the Board's detailed and comprehensive regulations, that a disclosure is required even in circumstances not identified by the Board.

This process can be expected to increase expenses for both lessors and consumers, and to do so with only the most negligible of corresponding gains in the amount of useful information provided to lessees. Here, for example, even if the precise amount of the residual value of Applebaum's vehicle had been disclosed, Applebaum still would have been unable himself to calculate his early-termination charge, as

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[5] Several new lawsuits have been filed as a consequence of the court of appeals' decision in this case. They include a purported class action in state court in Florida (*LaFramboise v. NMAC*, No. 00-007609 (Orange County Cir. Ct. filed Oct. 17, 2000) (allegedly involving more than 200,000 leases)) and federal cases in Georgia and New Jersey. *See Carmichael v. NMAC*, No. 1:00:CV-1254-TWT) (N.D. Ga. filed May 19, 2000); *Backensto v. NMAC*, No. 00CV-6203 (SMO) (D.N.J. filed Dec. 21, 2000).

the court of appeals seemingly acknowledged. App. 15a. The court of appeals' decision thus interferes with the Federal Reserve Board's regulatory scheme and undermines the ability of regulated entities to rely on the Board's expertise, and it does so without any meaningful countervailing advance in the purposes that the CLA was intended to serve.

Review should be granted to resolve the conflict among the circuits regarding the nature of the CLA's disclosure requirements, and to restore the ability of regulated entities to confidently prepare their lease disclosures in reliance on the regulatory regime in effect at the time of the leases.

A. The Third Circuit's Interpretation of the "Clear and Conspicuous Manner" Standard of the CLA and Regulation M Conflicts Directly with the Seventh Circuit's Decision in *Channell*

The Third Circuit's holding in this case that, in order to satisfy the "clear and conspicuous manner" standard in the CLA and Regulation M, the language must be not only legible, but also "reasonably understandable," cannot be reconciled with the Seventh Circuit's decision in *Channell*, 89 F.3d 379 (1996). *Channell* addressed the question whether an early-termination clause that uses the term "sum-of-the-digits method" must explain what that method entails in order to satisfy the CLA's requirement that disclosures be made "in a clear and conspicuous manner." The court sustained the district court's ruling that "only the method, and not the way the method works, needs to be disclosed," and observed that "[i]t is hard to read the statute and regulation any other way."[6] *Id.* at 382. Although neither the CLA nor Regulation M defines "clear and conspicuous," the *Channell*

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[6] The Official Staff Commentary to Regulation M now expressly permits the lessor to refer to "a generally accepted method," like the "constant yield method." 12 C.F.R. Pt. 213, Supp. I § 213.4(g) cmt. 2, at 377 (1998).

court found that the terms are "staples" of commercial law, and that " '[c]lear and conspicuous manner' . . . means visible, not simple. 'Manner' refers to the mode of presentation, not the degree of comprehension." *Id.* The court thus rejected the plaintiff's argument that an early-termination provision must be understandable to the average consumer in order to satisfy the CLA and Regulation M.

The court of appeals in this case disagreed with *Channell*'s conclusion that the statutory phrase "in a clear and conspicuous manner" deals only with the presentation of the disclosure, as opposed to its meaning. Although the court concluded, relying on dictionary definitions, that the term "conspicuous" is unambiguous, and requires, as *Channell* held, that the disclosure be "obvious to the eye" or "plainly visible," the court also ruled that the term "clear" can mean a number of things, including "easily visible or distinguishable," "without misconception, error, or vagueness," or "easily understood." App. 10a. In light of what the court considered to be ambiguity in the statutory language, the court consulted the Official Staff Commentary, which states that the CLA disclosures must be "in a reasonably understandable form." 12 C.F.R. Pt. 213, Supp. I, § 213.4(a)(1) cmt. 1, at 368 (1995).

The court did not explain why it believed that the Commentary's phrase "in a reasonably understandable form" resolved the perceived ambiguity in the statutory phrase "in a clear and conspicuous manner." Nor did the court explain how the Commentary's use of a phrase referring to the "form" of disclosures (as compared to the statutory language referring to the "manner" in which disclosures are made) implicated the substantive meaning of the disclosures rather than their mode of presentation. *See Channell*, 89 F.3d at 382. Instead, the court simply declared that the Commentary "adopts an interpretation that refers to the characteristics of the language used in making the disclosures." App. 10a. In the remainder of its opinion, the court discontinued references

to the "form" or "manner" of disclosure, and judged the disputed lease provision under the court's own "reasonably understandable" standard.

In a recent decision, the Seventh Circuit acknowledged, citing the court of appeals' decision in this case, that "the word 'clear' could mean 'easily understood' or some variant." *Jordan v. Toyota Credit Corporation*, 236 F.3d 866, 867 (7th Cir. 2001). The court refused, however, "to depart from the conclusion of *Channell* that how far to go in the direction of requiring complex concepts to be presented in easy-to-follow language (if that is possible at all) is a question for the Federal Reserve."[7] *Id.* The court of appeals in this case, by contrast, displayed no such restraint. Rather, having worked its way from the statute to Regulation M to the Staff Commentary to its own modified version of that Commentary, the court announced the following rule: "disclosure must be cast in a form that is reasonably understandable in light of the difficulty of the matter being disclosed. The benchmark is the nature of the matter discussed."[8] App. 11a n.6.

Applying its newly devised formula to the early-termination clause at issue, the court of appeals ruled that the

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[7] The *Jordan* court's statement that it "follow[ed] *Applebaum*" did not concern the Third Circuit's discussion of the interplay between the statutory phrase "in a clear and conspicuous manner" and the Commentary's phrase "in a reasonably understandable form." *See* 236 F.3d at 867. Rather, the statement in *Jordan* was clearly directed at the Third Circuit's other holding, which *Jordan* followed, that use of the term "constant yield method" is adequate under Regulation M.

[8] Even as it announced its new and more demanding disclosure standard, the court of appeals nevertheless declined to go so far as to align itself with the holding in *Lundquist v. Security Pacific Automotive Financial Servs.*, 993 F.2d 11, 15 (2d Cir. 1993), which required CLA disclosures to be within "the understanding of the average consumer." Instead, the court apparently attempted to devise its own middle ground somewhere between *Channell* and *Lundquist*.

term "residual value" was not "reasonably understandable" despite the fact that it is "a term with an established meaning in the leasing field." App. 15a. The court explained that the residual value is a specific amount assigned to the vehicle by the lessor at the beginning of the lease and that, because the lessor can use varying criteria in setting the residual value, the precise amount of that value cannot be known unless it is disclosed. *Id.* The court ignored the fact that the CLA explicitly provides that any early-termination charge must be reasonable, 15 U.S.C. 1667b(b); that, because the NMAC leases use the residual value in computing the early-termination charge, the residual value itself must be set so as not to produce an unreasonable charge on early termination; and that respondent in this case did not even contend that the early-termination charge actually imposed under the 1994 Lease was unreasonable in violation of the CLA. The court also disregarded the applicable model form published by the Federal Reserve Board, which did not require disclosure of the residual value amount at the time of the leases in this case.

In tinkering with the Federal Reserve Board's regulatory system and adopting its own conclusion as to whether the amount of residual value should have been disclosed, the court of appeals erred in several important ways.

First, the court substituted its own judgment for that of the Board in requiring a specific disclosure that neither the CLA itself nor Regulation M required. Notwithstanding the detailed and comprehensive character of the Board's regulations, and notwithstanding the fact that the relevant regulations required a residual value disclosure only in the case of open-end leases, the court took it upon itself to impose a similar requirement for the closed-end leases at issue here. By doing so, the court not only readjusted the carefully wrought regulatory balance between leasing companies and consumers but also deprived NMAC and other

lessors of the ability to prepare their lease disclosures in reliance on the items prescribed in the Board's regulations.

It is no answer to say that, some time later, when the Federal Reserve Board amended Regulation M in 1996, it chose to require further disclosures regarding residual value in closed-end leases. *See* 12 C.F.R. §213.4(f)(4) (1998). That is how changes in the Board's comprehensive regulatory regime are supposed to occur. After revisiting many features of the required CLA disclosures, and considering comments from both industry and consumer groups, the Board made extensive revisions to Regulation M and, in the course of doing so, explicitly defined "residual value," required disclosures regarding the significance of the residual value in calculating a lessee's periodic payments, and altered the relevant model form to provide for disclosure of the residual value's amount. Such modification of the CLA's disclosure requirements should be effected by Congress or the Board, not by the *ad hoc* rulings of a single federal court.

Nor can the court of appeals' decision be justified by a desire to enable an individual lessee to compute his own early-termination charge. As the court itself recognized (App. 13a), due to the complexity of some of the mathematics involved, "the vast majority of lay persons" could not calculate the early-termination charge under the lease even if the precise residual value were stated. Under these circumstances, it is difficult to see the utility in departing from the *Channell* rule just so that a mathematician—but not a consumer—could calculate the early-termination charge. This is not what Congress or the Federal Reserve Board intended by the phrase "in a clear and conspicuous manner." Instead of giving "the consumer information that can be put to use" in comparing competing lease terms—which both *Channell* and the courts below recognized as the purpose of the CLA's disclosure provisions—the rule adopted by the court of appeals contributes to a kind of "information

overload" that does not advance the legislative objective of the CLA.

Moreover, the court of appeals' rule likely will prove unworkable. *Channell* establishes a bright-line test under which lessors and lessees, as well as the Board and the courts, can discern whether a required disclosure is "in a reasonably understandable form." Under *Channell*, the question is whether the disclosure is visible, and "so written that a reasonable person against whom it is to operate ought to have noticed it." 89 F.3d at 382 (internal quotes omitted). By contrast, the test devised by the court below—*i.e.*, reasonably understandable in light of the difficulty of the matter being disclosed—can only be applied by a person familiar with the automobile leasing industry or by a court operating with the benefit of 20/20 hindsight. This small group is a far cry from the CLA's target audience. *See* App. 6a (noting that the purpose of the CLA was "to provide consumers with meaningful information") (quoting S. Rep. No. 94-590 (1976), *reprinted in* 1976 U.S.C.C.A.N. 431, 432); *see also Smith v. Cash Store Management, Inc.*, 195 F.3d 325, 327-28 (7th Cir. 1999) (sufficiency of TILA disclosures to be determined "from the standpoint of an ordinary consumer, not the perspective of a Federal Reserve Board member, federal judge, or English professor.") (quoting *Cemail v. Viking Dodge*, 982 F. Supp. 1296, 1302 (N.D. Ill. 1997)).

By its nature, the rule adopted by the court of appeals can be implemented only on a case-by-case basis after the fact. In the meantime, lessors will be left in the dark as to whether a particular disclosure passes muster. This would hardly advance the "decided [congressional] preference" evident in the language and legislative history of the CLA, and recognized by this Court in *Ford Motor Credit Co.*, "for resolving interpretive issues by uniform administrative decision, rather than piecemeal through litigation." 444 U.S. at 568.

Finally, the mischief caused by the court of appeals' decision will not be limited to the CLA. The "clear and conspicuous" standard is replicated in several other sets of regulations promulgated by the Federal Reserve Board. *E.g.*, 12 C.F.R. §229.15(a) (Regulation CC, implementing the Expedited Funds Availability Act); 12 C.F.R. §230.3(a) (Regulation DD, implementing the Truth in Savings Act of 1991); 12 C.F.R. §226.17(a)(1) (Regulation Z, implementing the Truth in Lending Act). If left unresolved, the current circuit split regarding the proper interpretation of this language will cast doubt upon the legality of disclosures made under all of these regulations.

B. The Court of Appeals' Decision in This Case Conflicts with this Court's Admonition in *Ford Motor Credit Co. v. Milhollin* Against Judicial Activism in the Face of Regulatory Silence.

In holding that NMAC was required to disclose or define "residual value" in the Applebaum leases, the court of appeals improperly read additional disclosure requirements into the CLA and Regulation M despite the Federal Reserve Board's decision to require such disclosure only in open-end leases. This is precisely the sort of judicial creativity that was criticized by this Court in *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980). In that case, which involved the interpretation of the disclosure provisions of the TILA, 15 U.S.C. §§ 1601 *et seq.*, the Court stated:

> [L]egislative silence is not always the result of a lack of prescience; it may instead betoken permission or, perhaps, considered abstention from regulation. In that event, judges are not accredited to supersede Congress or the appropriate agency by embellishing upon the regulatory scheme. Accordingly, caution must temper judicial creativity in the face of legislative or regulatory silence.

444 U.S. at 565. The Court thus directed judges "to refrain from substituting their own interstitial lawmaking for that of

the Federal Reserve, so long as the latter's lawmaking is not irrational." *Id.* at 568. This principle has guided decisions of this Court and lower courts on numerous occasions since.[9]

Here, the Federal Reserve Board's regulations required disclosure of residual value in open-end leases but not in closed-end leases. *See* 12 C.F.R. §213.4(g)(15) (1995); 61 Fed. Reg. 52,246, 52,251 (1996). Nonetheless, the court of appeals felt free to impose its own requirement that residual value be defined or disclosed in the Applebaum leases, not because any regulation specifically required such disclosure, but because, in the judgment of the court of appeals, such disclosure was necessary to make the early-termination provision "reasonably understandable"—a standard that does not appear in either the statute or Regulation M. The court

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[9] *See, e.g., O'Melveny & Myers v. Federal Deposit Ins. Corp.*, 512 U.S. 79, 85 (1994) (refusing to "adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed"); *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336, 345 (1982) ("When an administrative agency historically has engaged in comprehensive regulation of an industry's credit practices, the agency's silence regarding an affirmative defense based on a violation of those regulations must be deemed significant."); *Manhattan Tankers, Inc. v. Dole*, 787 F.2d 667, 670 (D.C. Cir. 1986) (declining to recognize competitor's right of participation in administrative proceedings under the Wrecked Vessels Statute in the face of both statutory and regulatory silence on the issue); *Ritter v. Durand Chevrolet, Inc.*, 945 F. Supp. 381, 384 (D. Mass. 1996) (holding that neither TILA nor Regulation Z required lender to conduct actuarial analysis of allocation of third-party insurance company's premium in order to allow the consumer to verify compliance with disclosure requirements); *Gaydos v. Huntington Nat'l Bank*, 941 F. Supp. 669, 677 (N.D. Ohio 1996) (refusing to require lessor to disclose its practice of earning profit on security deposit where CLA and Federal Reserve's regulations required no such disclosure); *In re Thebeau*, 3 B.R. 537, 538 (E.D. Ark. 1980) (relying on *Ford Motor Credit Co.* in refusing to read bankruptcy code's "good faith" provision as requiring plan to propose payment of creditors, explaining that "[c]aution tempers this Court not to create payment requirements to creditors when Congress has already said what payments are required.").

dismissed as insignificant the fact that the Federal Reserve Board knew how to require disclosure of residual value when it saw fit, and had in fact required lessors to make such disclosure in open-end leases. Instead, the court chose to consider, not whether this decision was irrational, as this Court instructed, *see* 444 U.S. at 568, but whether the court could imagine some reason why the Federal Reserve Board might have overlooked the need for a comparable requirement in closed-end leases. Concluding that "a critical difference" between open- and closed-end leases could explain the Federal Reserve's silence—*i.e.*, that open-end leases by definition rely on the concept of "residual value" to determine the lessee's liability at the end of the lease, whereas "lessors need not, and often do not, use the concept of residual value [to determine early-termination charges] in closed-end leases"—the court of appeals held that "the Board's failure specifically to require the disclosure of residual value in closed-end leases cannot reasonably be interpreted as a considered decision that disclosure is not necessary . . . ." App. 17a.

The court's willingness to interpose its own regulatory requirement thus depended on its own after-the-fact assessment of whether the Board made a "considered decision." This is just the sort of "judicial creativity" and regulatory gap-filling that *Ford Motor* counsels against. If the court of appeals' decision is permitted to stand, it will open the door to increased judicial embellishment of complex regulatory schemes whenever the agency charged with implementing a statute decides not to impose a particular requirement that a court later deems desirable. In the face of regulatory silence, courts will impose their own regulations whenever they can conjure up a reason for thinking that the agency's silence may not have been the product of a "considered decision" not to regulate. If the decision below is any indication, courts routinely will find such a reason unless the agency explicitly has declared its intention to leave an area unregulated. *See*

App. 14a (rate implicit in lease need not be disclosed under 12 C.F.R. §213.4(g)(12) (1995), since "the Board has declined to impose an obligation that lessors disclose the lease rate after giving the question considerable thought and attention") (citing Federal Reserve Final Rule, 61 Fed. Reg. 52,246, 52,254-55). Requiring an agency in every instance in which it deems a potential regulation unnecessary to explain that its failure to regulate was intentional will put an unreasonable burden on agencies to anticipate future litigation and to enumerate in advance all of the conceivable regulatory steps that it has deliberately decided not to take.

The Court should grant review in this case to prevent the erosion of agency autonomy and to re-emphasize the need for judicial deference to administrative agencies operating within their areas of expertise. Under *Ford Motor*, the Federal Reserve Board's decision to require disclosure of residual value in open-end leases but not in closed-end leases was entitled to such deference, and the court of appeals should have abstained, as the district court did, from substituting its own judgment for that of the agency. Unless the court had some basis for finding the Federal Reserve's decision irrational—which it did not—"[f]aced with an apparent lacuna in the express prescriptions of [the CLA and Regulation M,] the Court of Appeals had no ground for displacing the Federal Reserve staff's expert judgment." 444 U.S. at 570.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 23, 2001

APPENDIX A

[Filed August 30, 2000]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1373

LEONARD APPLEBAUM,
Appellant,

v.

NISSAN MOTOR ACCEPTANCE CORPORATION;
REITENBAUGH ENTERPRISES, INC.

ON APPEAL FROM THE ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Dist. Court No. 97-cv-07256

District Court Judge: The Honorable Norma L. Shapiro

Argued Tuesday, January 11, 2000

Before: BECKER *Chief Judge*, and ALITO and BARRY,
Circuit Judges

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OPINION OF THE COURT

ALITO, Circuit Judge:

Leonard Applebaum leased two automobiles from Nissan Motor Acceptance Corporation ("NMAC") through a dealership owned and operated by Reitenbaugh Enterprises ("Reitenbaugh"). Applebaum sued NMAC and Reitenbaugh, contending that the early termination provisions in his leases violated the disclosure requirements of the Consumer Leasing Act ("CLA") and Regulation M, which implements the Act. The District Court entered summary judgment in favor of the defendants, and Applebaum took this appeal. We hold that the early termination provisions in the NMAC lease do not comply with the requirements of the CLA: we therefore reverse.

I.

On November 2, 1994, Applebaum signed a 36-month closed-end lease[1] for a 1995 Nissan Maxima. The lease was between Applebaum and Ritenbaugh, but Reitenbaugh promptly assigned the lease to NMAC. Applebaum terminated his 1994 lease approximately 10 months before the end of the 36-month term in order to trade in his 1995 Maxima for a 1997 model. As is common with automobile leases, NMAC's standard closed-end motor vehicle lease agreement imposed a penalty for early termination. The lease provided:

> First, all monthly lease payments, which under the terms of my lease, are not yet due and the residual value of the vehicle are discounted to present value by the Constant Yield Method at the rate implicit in the lease (the "Adjusted Lease Balance"). This amount is then reduced by the Realized Value (and insurance) proceeds which you receive for the vehicle. The balance due you is the Early Termination Charge which I will pay to you immediately. If there is an excess, however, you will not refund it to me.

1994 Lease, App. at R3; 1997 Lease, App. at R4-5. In the course of negotiating the 1997 lease, Reitenbaugh quoted Applebaum a pay-off figure of $18,111. Reitenbaugh explained that after a trade-in allowance of $12,500 ("the

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[1] A "closed-end" lease is "[a] lease in which [the lessee is] not responsible for the difference if the actual value of the vehicle at the scheduled end of the lease is less than the residual value," but the lessee "may be responsible for excess wear and excess mileage charges and for other lease requirements." Federal Reserve Board Leasing Language (last updated March 29, 2000).

<http:// www.federalreserve.gov/pubs/leasing/glossary htm>.

Realized Value") he owed NMAC $5,611 as an early termination charge.[2]

According to Applebaum, he was aware that there would be an early termination penalty but was surprised that it was so large. When he asked Reitenbaugh to explain how it had arrived at the pay-off figure, the dealer responded that it had not performed the calculation and had no idea how the figure had been derived. Reitenbaugh's practice was to call NMAC for the pay-off figure, and the dealer suggested that Applebaum call NMAC and ask how the figure was calculated. Heeding Reitenbaugh's advice, Applebaum telephoned NMAC in early January 1997. Applebaum contends that his conversation with NMAC was equally unhelpful. Without a satisfactory explanation of how NMAC had calculated the early termination charge, Applebaum nonetheless entered into the 1997 lease. The $5,611 charge was capitalized into the lease payments under the 1997 lease.

Applebaum continued to seek an explanation of his early termination liability. Having failed to make headway on his own, Applebaum retained counsel. By letter to NMAC in July 1997, Applebaum's counsel requested a written explanation of how NMAC had arrived at the $18,111 pay-off figure. In reply, NMAC's legal department stated that it could not reconstruct the pay-off calculation because the computer system that performs the calculation does not retain pay-off Information once an account has been terminated. Applebaum's counsel pressed for an identification of the residual value of the vehicle and how that value had been discounted to present value at the rate implicit in the lease using the constant yield method. *See* App. at R-9. NMAC responded that the rate was proprietary and that its prior

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[2] The record shows that the residual value of Applebaum's 1995 Nissan was $15,018.30 and that the rate implicit in the lease was 8.910068. *See* App. at R-55.

disclosures were adequate to satisfy Regulation M. *See* App. at R-10.

Applebaum then sued NMAC and Reitenbaugh, alleging a violation of the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667e. Applebaum contended that the early termination provision of the leases violated the CLA because the formula for computing the early termination charge was indecipherable and because the provision did not define some of the terms it used. The District Court granted summary judgment for the defendants, holding that the CIA and Regulation M require an early termination clause to be "visible to the lessee and in a readable format" but that the clause "need not be simple enough to do the mathematical calculation of the exact amount." Dist. Ct. Op. at 8. The Court concluded that the lease provisions at issue here were not required to explain the constant yield method, a term that was "well known in the industry." *Id.* at 12. Likewise, the Court held that the lease provisions were not required to disclose the vehicles' residual value. This term, the court commented, "is not void of meaning to the average consumer; it means whatever value remains in the vehicle when the lease terminates." *Id.* at 15. "The CLA and Regulation M," the Court added, "do not require further definition." *Id.* Applebaum then took this appeal.

II.

In 1976, In response to an emerging trend toward automobile leasing, Congress passed the Consumer Leasing Act ("CLA"), 15 U.S.C. § 1667-1667e as Chapter 5 of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1607 *et seq.* The CLA was intended "to assure a meaningful disclosure of the terms of leases of personal property for personal, family, or household purposes so as to enable the lessee to compare more readily the various lease terms available to him, limit balloon payments in consumer leasing, enable comparison of lease terms with credit terms where appropriate, and to assure

meaningful and accurate disclosures of lease terms in advertisements," 15 U.S.C. § 1601(b). The Senate Report accompanying the CLA stated that "[t]he purpose of the legislation is to provide consumers with meaningful information about the component and aggregate costs of consumer leases, so that they can make better informed choices between leases, and between leases and credit sales." *See* S. Rep. No. 94-590 (1976), *reprinted in* 1976 U.S.C.C.A.N. 431, 432.

The Federal Reserve Board has been given the authority to issue rules implementing the CLA, *see* 15 U.S.C. § 1604, and the Board has exercised that authority by promulgating "Regulation M," 12 C.F.R § 213 *et seq.* (In this case, we consider the version of Regulation M in effect prior to the 1996 amendment now in force.)[3] The Board's staff has also issued official commentary regarding these provisions. In *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980), the Supreme Court instructed that the Board's interpretation of the TILA and Regulation M should be accepted so long as they are "not irrational."[4]

The CLA provides in pertinent part as follows:

> Each lessor shall give a lessee prior to the consummation of the lease a dated written statement on which the lessor and lessee are identified setting out accurately and *in a*

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[3] In 1996, the Federal Reserve Board revised Regulation M and issued new commentary. Although these revisions became effective on October 31, 1996, compliance was optional until October 1, 1997. Applebaum does not contend that these new provisions apply in this case.

[4] *Ford Motor Credit Co.* was decided before *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), but we interpret *Ford Motor Credit Co.* to mean that the Board's interpretation of the TILA is governed by *Chevron* and that its interpretation of its own regulations is governed by *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-14 (1945).

clear and conspicuous manner the following information with respect to that lease, as applicable:

* * *

(11) A statement of the conditions under which the lessee or lessor may terminate the lease prior to the end of the term and the *amount or method of determining any penalty* or other charge for delinquency, default, late payments, or early termination.

15 U.S.C. § 1667a(11) (emphasis added).

The version of Regulation M in effect at the time in question required that lessors' disclosures "be made clearly, conspicuously, in meaningful sequence, and in accordance with the further requirements of this section." 12 C.F.R. § 213.4(a)(1) (1995). The Official Staff Commentary for this provision explained that "clearly, conspicuously, and in meaningful sequence" required "that disclosures be in a reasonably understandable form." 12 C.F.R. Pt. 213, ¶ 4(a)(1). This Commentary added that "while the regulation requires no particular mathematical progression or format, the disclosures must be presented in a way that does not obscure the relationship of the terms to each other." *Id.*

With respect to provisions imposing an early termination penalty, Regulation M mandated that the lessor provide:

> A statement of the conditions under which the lessee or lessor may terminate the lease prior to the end of the lease term and the *amount or method for determining the amount* of any *penalty* or other *charge for early termination.*

12 C.F.R § 213.4(g)(12) (1995) (emphasis added).[5]

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[5] We note that provisions of Regulation M that were added in 1996 and that are now in effect address the chief issues that are presented in this case. The new Staff Commentary specifically states that a lease need only

III.

A.

Applebaum argues that ¶ 17 of the 1994 Lease and ¶ 18 of the 1997 Lease (collectively "the Leases") violate the CLA and Regulation M because their disclosures regarding the early termination charges are not set out "in a clear and conspicuous manner." Applebaum contends that the early termination provision is "so indecipherable that virtually no reader could comprehend it." Appellant's Br. at 21. Applebaum suggests that the Second Circuit's per curiam opinion in *Lundquist* v. *Security Pacific Automotive Financial Services*, 993 F.2d 11 (2d Cir. 1993), properly interpreted the meaning of the CLA's "clear and conspicuous manner" requirement. In *Lundquist*, the Court held that the early termination disclosures of an automobile lease agreement violated the CLA because they were "confusing, unduly complicated, and unnecessarily convoluted" and "beyond the understanding of the average consumer." *Lundquist*, 993F.2d at 15.

Lundquist was sharply criticized by the Seventh Circuit in *Channell v. Citicorp Nat'l Servs., Inc.*, 89 F.3d 379, 383 (7th Cir. 1996). The Seventh Circuit confronted a challenge to a lessor's method of determining unearned interest in an early termination clause. The lessee asserted that a reference in the lease to the "Sum of the Digits" method was "incomprehensible to the average consumer and therefore violated the requirement that disclosures be clear and conspicuous." *Id.* at

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name the method of discounting to present value that it uses and need not explain how that method works. *See* 12 C.F.R. Pt. 213, ¶ 4(g) (2000).

In revising Regulation M, the Board specifically considered whether to require disclosure of the rate implicit in the lease but ultimately decided not to do so. *See* FRB Final Rule, 61 FR 52246, 52254-56 (Oct. 7, 1996). However, the revised version of Regulation M requires disclosure of residual value in both open- and closed-end leases. *See* 12 C.F.R § 213.4(f)(4) (2000).

381. Noting that 12 C.F.R § 213.4(g)(12) could be satisfied by disclosing the "method of determining the amount of any penalty or other charge for early termination," the Court concluded that "only the method, and not the way the method works, needs to be disclosed." *Id.* at 382. The Court stated:

> It is hard to read the statute and regulation any other way. "Clear and conspicuous manner"—the language of § 1667a—means visible, not simple. "Manner" refers to the mode of presentation, not the degree of comprehension. The Act and Regulation M do not define "clear and conspicuous," but the words are staples of commercial law. The Uniform Commercial Code defines "conspicuous" as "so written that a reasonable person against whom it is to operate ought to have noticed it." UCC § 1-201(10). A disclaimer of the warranty of merchantability is enforceable if conspicuous, *see* UCC § 2-316(2), even if the average consumer hasn't the vaguest idea what a "warranty of merchantability" entails. Regulation M calls for the use of 10-point type at a minimum. § 12 C.F.R. 213.4(a)(1).

Id.

Turning to *Lundquist*, the Court observed:

> We confess to substantial difficulty deciphering the opinion in *Lundquist*. . . . The court does not explain why the operation of a formula must be simple—for the Act requires a clear presentation but does not limit the number of variables the lessor may consider. The quoted words "confusing, unduly complicated, and unnecessarily convoluted" lack a source—they are not quoted from anything, and a search of a database containing all federal opinions of the last 50 years did not turn up any other uses of that phrase. It does not appear anywhere in the United States Code or the Code of Federal Regulations.

Id. at 383.

B.

Under 15 U.S.C. § 1667a(11), the leases at issue in this case were required to disclose either the "amount or method for determining" the early termination charge. Since the amount was not disclosed, the critical question is whether the "method" was revealed in the way that the law demands. Under 15 U.S.C. § 1667a, this disclosure had to be effected "in a clear and conspicuous manner."

The term "conspicuous" is unambiguous. In ordinary usage, it means "obvious to the eye" or "plainly visible." Webster's Third New International Dictionary 485 (1971). *See also Channell*, 89 F.3d at 381 (citing similar definition in UCC § 1-201(10)). Here, Applebaum does not contend that the disclosures in the early termination provision were not "conspicuous."

The term "clear," on the other hand, may be interpreted in several different ways. Among other things, it may mean: (1) "easily visible or distinguishable," (2) "without misconception, error, or vagueness," or (3) "easily understood." Webster's Third New International Dictionary 419. In § 1667a, the term "clear" might refer to the physical characteristics of the printing used in the lease, or it might refer to the characteristics of the language used in making the required disclosures. If the *Channel* opinion suggests that the first meaning is the only possible one, *see* 89 F.3d at 382 (" 'Clear and conspicuous'—the language of § 1667a—means visible . . . ."), we respectfully disagree. Because the statutory language is ambiguous, it is appropriate to consider the Federal Reserve Board's interpretation of this provision.

The Board's Official Staff Commentary adopts an interpretation that refers to the characteristics of the language used in making the disclosures. This Commentary states that disclosures must be made "in a reasonably understandable form." 12 C.F.R. Pt. 213, ¶ 4(a)(1) (1995). "Understandable" means more than "legible"; many things are legible but not

understandable. It is therefore apparent that the Official Staff Commentary interprets the term "clearly" to refer to meaning, not just appearance. We defer to this interpretation. We thus hold that disclosure of the method of calculating an early termination penalty must not only be legible; it must also be "reasonably understandable."

To say that the language used in a disclosure must be cast in "reasonably understandable form," however, is not to say that the meaning of this language must be within "the understanding of the average consumer," as the Second Circuit has suggested. *Lundquist,* 993 F.2d at 15. Here, as in other areas of the law, what is reasonable depends on the surrounding circumstances. Thus, the CLA and Regulation M require disclosure in a form that is "reasonably understandable" in light of the inherent difficulty or complexity of the method described; they do not necessarily demand disclosure in a form that the average consumer can understand. We recognize that some methods used in calculating early termination penalties involve math that is well beyond the understanding of the average consumer. If 15 U.S.C. § 1667a and 12 C.F.R. § 213.4 (1995) meant that any method of determining an early termination penalty had to be capable of explanation in a way that the average consumer could understand, these provisions would in effect impose substantive restrictions on the methods that a lessor could employ. It is plain, however, that these provisions were not intended to impose any such substantive restrictions.[6]

C.

With these standards in mind, we turn to the leases at issue here. As previously noted, they provide in pertinent part as follows:

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[6] To clarify, we mean that disclosure must be cast in a form that is reasonably understandable in light of the difficulty of the matter being disclosed. The benchmark is the nature of the matter discussed.

> First, all monthly lease payments, which under the terms of my lease, are not yet due and the residual value of the vehicle are discounted to present value by the Constant Yield Method at the rate implicit in the lease (the "Adjusted Lease Balance"). This amount is then reduced by the Realized Value (and insurance) proceeds which you receive for the vehicle. The balance due you is the Early Termination Charge.

App. at R3, R4-5.

This language plainly satisfies one of the requirements set out in the Federal Reserve Board Staff Commentary, *viz.*, this language "does not obscure the relationship of the terms to each other." 12 C.F.R. Pt. 213, ¶4(a)(1) (1995). On the contrary, the relationship of the terms is easy to grasp:

> **Early Termination Charge=Adjusted Lease Balance-Realized Value.**
>
> **Adjusted Lease Balance** = (**Residual Value**+unpaid present value) discounted to present value at the **Rate Implicit in the Lease** using the **Constant Yield Method**.

If the terms "constant yield method," "rate implicit in the lease," and "residual value," were "reasonably understandable," the method used in calculating the early termination penalty would be as well. We therefore consider those specific terms.

IV.

Applebaum contends that the terms "constant yield method," "rate implicit in the lease," and "residual value" should have been explained in the leases. The version of Regulation M in effect at the time in question required leases covered by the CLA to disclose numerous categories of specific information, *see* 12 C.F.R § 213.4(g)(1)-(15) (1995), but Regulation M did not specifically require a definition or description of any of these terms.

Constant Yield Method

The "constant yield method" is a technical term with a specified meaning. A Federal Reserve Board webpage that explains terms related to vehicle leasing defines the constant yield method as follows:

> The method of earning rent charges in which the rent charge earned each month is proportional to the remaining lease balance. Under this method, the lessor or assignee earns rent charges at an equal rate over the term, similar to most home first mortgages.

Federal Reserve Board, Leasing Language (last updated March 29, 2000) ***<http://www.federalreserve.gov/pubs/leasing/glossary.htm.>***. Use of this method, however, is not easy. See, e.g., 26 C.F.R. § 1. 1272-1 (b) (setting out steps for using constant yield method for certain tax purposes). In all likelihood, the vast majority of lay persons could not discount to present value using the constant yield method even if a description were provided. "A beneficial set of disclosure rules gives the consumer information that can be put to use, while withholding technical information that distracts attention from the rest of the disclosures." *Channel,* 89 F.3d at 382.

Under these circumstances, we hold that simply disclosing that the "constant yield method" was used, without attempting to explain how to use this method, satisfied the "reasonably understandable" requirement. Although the Official Staff Commentary to the current version of Regulation M does not change the law retroactively, we are persuaded by the staff's determination that simply naming an established method of discounting to present value, without attempting to explain the method in the lease itself, is sufficient to make a lease reasonably understandable for present purposes. This commentary states:

> [f]or purposes of the early termination charge a lessor may use the name of a generally accepted method of computing the unamoritzed cost portion (also known as the "adjusted lease balance") of its early termination charges. For example, a lessor may state that the "constant yield" method will be utilized in obtaining the adjusted lease balance

12 C.F.R. Part 213, ¶ 4 (g) (2000).

Rate Implicit in the Lease

Every discounting method must employ some discount rate, but early termination provisions rarely set forth such a rate. The presumption in these leases, apparently, is that whatever the named discounting method it will be carried out at the rate implicit in the lease. We view the leases' reference to the rate implicit in the lease as surplusage, since NMAC would have been required to discount at the rate implicit in the lease even in the absence of such a reference. We also note that the Board has declined to impose an obligation that lessors disclose the lease rate after giving the question considerable thought and attention. *See* FRB Final Rule, 61 FR 52246, 52254-55

Residual Value

Although the NMAC leases use the concept of "residual value" in calculating the early termination penalty, the leases do not define that term or specify the vehicles' residual value. What is more, neither Reitenbaugh nor NMAC provided this information to Applebaum or his attorney, despite their requests.[7]

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[7] We note that even had Reitenbaugh or NMAC provided Applebaum with the residual value upon his request, it would not have cured their disclosure violation. The duty to disclose under the CLA is breached, if at all, at the time of lease consumption. 15 U.S.C. § 1667a.

"Residual value," like the constant yield method, is a term with an established meaning in the leasing field. The Federal Reserve Board's webpage defines the term as follows: "The end-of-term value of the vehicle established at the beginning of the lease and used in calculating your base monthly payment . . . ." Federal Reserve Board, Leasing Language (last updated March 29, 2000) ***<http://www.federalreserve.gov/pubs/leasing/ glossary.htm>***. Similarly, the term is now defined by 12 C.F.R. § 213.2(n) (2000) as "the value of the leased property at the end of the lease term, as estimated or assigned at consummation by the lessor, used in calculating the base periodic payment." Moreover, it is apparent that this is precisely the sense in which the term is used in the NMAC leases. Thus, "residual value" is not "whatever remains in vehicle when the lease terminates", Dist. Ct. Op. at 15; rather, "residual value" is a figure assigned by the lessor at the beginning of the lease.

In order to discharge their disclosure obligations, the defendants in this case were required to reveal the residual value that had been assigned to Applebaum's cars. NMAC knew these figures, and it could have easily disclosed them. Its failure to do so meant that no one—not even a person capable of determining the rate implicit in the leases and capable of discounting to present value using the constant yield method—could have calculated an early termination penalty under the formula set out in the leases. An early termination clause that fails to reveal an otherwise unknowable variable used in determining an early termination penalty[8] cannot be regarded as "reasonably understandable" in any meaningful sense of the term.

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[8] This is distinguishable from information that is unknown to the lessor at the time of lease signing, for which the lessor is permitted to provide a reasonable estimate. *See* 15 U.S.C. § 1667a ('The Board may provide by regulation that any portion of the information required to be disclosed under this section may be given in the form of estimates where the lessor

NMAC's chief argument, which the District Court accepted, is that the Federal Reserve Board, in promulgating the version of Regulation M in effect at the time in question, implicitly determined that closed-end leases, like those involved in this case, did not have to reveal the vehicles' residual value. NMAC notes that the version of 12 C.F.R. § 213.4 (g)(15) in effect at the time required an open-end lease to disclose the vehicle's residual value but that no such requirement was imposed with respect to closed-end leases. Warning against upsetting the FRB's regulatory scheme by imposing a disclosure obligation that the FRB declined to impose, NMAC urges that we not read the absence of a disclosure requirement as

> the result of a lack of prescience; it may instead betoken permission, or perhaps, considered abstention from regulation. In that event, judges are not accredited to supersede Congress or the appropriate agency by embellishing upon the regulatory scheme. Accordingly, caution must temper judicial creativity in the face of legislative or regulatory silence.

Ford Motor Credit Co., 444 U.S. at 565.

We reject this argument because it overlooks a critical difference between open- and closed-end leases. An open-end lease is one in which the lessee's liability at the end of the

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is not in a position to know exact information."); 12 ,C.F.R Pt. 213, ¶ 4(d) (1995) ("The lessor may use estimates to make disclosures if necessary information is unknown or unavailable at the time the disclosures are made. . . . Estimates must be made on the basis of the best information reasonably available at the time disclosures are made."). For example, in Applebaum's leases, the early termination charge was a function of the Realized Value of the automobile—*viz.*, the value of the vehicle at the time of lease termination. Because the parties to the lease could not predict when the lease would terminate at the time they entered into the lease, it was sufficient to provide the method for determining Realized Value at lease end. *See* App. at 3.

lease term is based on the difference between the residual value of the leased property and its realized value.[9] Consequently, residual value is always relevant to a lessee's liability in an open-end lease, and the Board thus had a strong reason to require the disclosure of this value. By contrast, lessors need not, and often do not, use the concept of residual value in closed-end leases, and therefore, the Board's failure specifically to require the disclosure of residual value in closed-end leases cannot reasonably be interpreted as a considered decision that disclosure is not necessary to make a closed-end lease reasonably understandable if it uses that term. Here, NMAC constructed its early termination provision in such a manner as to make residual value an essential component of the calculation. Since the leases took this approach, defendants were obligated to disclose this value. They did not do so.

In sum, we hold that the requirement to disclose in a "clear and conspicuous manner" the method of determining the amount of an early termination charge includes an obligation to disclose the value of a variable such as residual value, that is an essential component of the formula used in calculating the charge. Accordingly, we reverse and remand for the entry of judgment in favor of Applebaum and for the award of appropriate relief.

A True Copy
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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[9] *See* 12-C.F.R. § 213.2(j) (2000). We cite this subsequently promulgated provision to show the commonly understood meaning of this term, not because we regard it as legally binding in this case.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed Apr. 22. 1999]

Civil Action
NO. 97-7256

LEONARD APPLEBAUM
v.

NISSAN MOTOR ACCEPTANCE CORP.
& REITENBAUGH ENTERPRISES, INC.

MEMORANDUM and ORDER

Norma L. Shapiro, S. J. April 21, 1999

The complaint of plaintiff Leonard Applebaum ("Applebaum") alleges defendants Nissan Motor Acceptance Corp. ("NMAC") and Reitenbaugh Enterprises, Inc. ("Reitenbaugh Dealership") violated the Consumer Leasing Act ("CLA"), 15 U.S.C. §§ 1667-1667f. Now before the court are defendants' motions for summary judgment, plaintiff's motion for partial summary judgment, and plaintiff's motion to amend the complaint to add a claim under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Con. Stat. Ann. §§ 202-1-202-8. For the reasons stated below, defendants' motions for summary judgment will be granted and plaintiff's motion for partial summary judgment will be denied; plaintiff's motion to amend the complaint will be denied without prejudice.

BACKGROUND

On November 2, 1994, Applebaum entered into a closed-end[1] lease with Reitenbaugh Dealership for a 1995 Nissan Maxima ("1994 lease"). On January 20, 1997, Applebaum terminated this lease early and entered into a new closed-end lease for a 1997 Nissan ("1997 lease"). The signed leases were assigned by Reitenbaugh Dealership to NMAC. Both these leases contained an Early Termination Liability clause to govern the lessee's liability in case the lease was terminated before the end of its term.

The early termination clause of each lease states:

> [I]f [the lessee] Terminate[s] early, in addition to the above charges, [the lessee] must pay [the lessor] an Early Termination Charge which is determined as follows; First, all monthly payments, which under the terms of the [the] lease, are not yet due and the residual value of the vehicle are discounted to present value by the Constant Yield method at the rate implicit in the lease (the "Adjusted Lease Balance"). This amount is then reduced by the Realized Value (and insurance) proceeds which [the lessor] receive[s] for the vehicle. The balance due [the lessor] is the Early Termination Charge which [the lessee pays the lessor] immediately. If there is an excess, however, [the lessor] will not refund it to [the lessee].

NMAC calculated the Early Termination Charge for the 1994 lease as $5611, and rolled this amount into the payments under the 1997 lease. Applebaum spoke with Reitenbaugh Dealership and NMAC representatives to ascertain the calculation method for the charge, but they

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[1] A "Closed-end lease" is any lease that is not an "open-end lease" See 12 C.F.R. § 213.2. An "open-end lease" is one in which the lessee is liable for any value the lessor does not recover upon resale of the vehicle at the end of the lease. *See id.*

could not explain the "constant yield method" used in the calculation.

Applebaum filed suit under the CLA for disclosure violations. After discovery, defendants, moving for summary judgment, Asserted that the Early Termination Liability clauses did not violate the CLA; Reitenbaugh Dealership also claimed it was not liable for any violation of the CLA because it had no control over the language of the lease. Plaintiff cross-moved for summary judgment and moved to amend the complaint to assert an additional claim under the Pennsylvania Unfair Trade Practices and Consumer Protection Law.

DISCUSSION

I. Standard of Review

Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A defendant moving for summary judgment bears the initial burden of demonstrating there are no facts supporting the plaintiff's claim; then the plaintiff must introduce specific, affirmative evidence there is a genuine issue for trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-324 (1986). "When a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed. B. Civ. P. 56(e).

The court must draw all justifiable inferences in the non-movant's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A genuine issue of material fact exists only when "the evidence is such that a reasonable jury could

return a verdict for the non-moving party." *Id.* at 248. The non-movant must present sufficient evidence to establish each element of its case for which it will bear the burden at trial. *See Matsushita Elec. Indus. Co v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). The parties in this action cross-moved for summary judgment; no genuine issues of material fact exist, and the court decides the issues as a matter of law.

II. Reitenbaugh Dealership Liability

A lessor is subject to liability if a lease violates the CLA, 15 U.S.C. § l667d; the CLA defines the lessor as "a person who is regularly engaged in leasing, offering to lease, or arranging to lease under a consumer lease." 15 U.S.C. § 1667(3). Reitenbaugh Dealership signed the leases as lessor, and immediately assigned them to NMAC; it contends it did not write the 1994 or 1997 leases or control the language of the leases. The only involvement of Reitenbaugh Dealership with the leases was presenting them to Applebaum for signing.

A dealer acting as an authorized agent for the financier was held liable under the CLA in *Dwyer v. Barco Auto Leasing Corp.*, 903 F. Supp. 205 (D. Mass. 1995). The *Dwyer* court held the dealership liable despite the fact that it had not entered into a lease with the consumer. *See id.* at 210. A "dealer who essentially acts as the financier's authorized agent, completing and forwarding the lease agreement for execution" arranges leases under the CLA. *Id.* Here, Reitenbaugh Dealership engaged in the consumer transaction by presenting the lease to Applebaum, completing it, signing it, and forwarding it to NMAC; Reitenbaugh Dealership cannot avoid joint and several liability merely because it did not actually write the lease language.[2]

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[2] Reitenbaugh Dealership's motion for summary judgment nevertheless will be granted, as this court finds the lease does not violate the CLA as a matter of law.

III. Violation of the CLA

The Consumer Leasing Act ("CLA"), an amendment to the Truth in Lending Act ("TILA"), states in relevant part:

> Each lessor shall give a lessee prior to the consummation of the lease a dated written statement on which the lessor and lessee are identified setting out accurately and in a clear and conspicuous manner the following information with respect to that lease:
>
> > (11) A statement of the conditions under which the lessee or lessor may terminate the lease prior to the end of the term and the amount or method of determining any penalty or other charge for delinquency, default, late payments, or early termination.

15 U.S.C. § 1667a. This provision was in effect at the time both the 1994 and the 1997 leases were signed by the parties.

The TILA "was passed primarily to aid the unsophisticated consumer so that he would not be easily misled as to the total costs of financing." *Thomka v. A.Z. Chevrolet. Inc.*, 619 F.2d 246, 248 (3d Cir. 1980). Plaintiff need not prove he was injured by a failure to meet the disclosure requirements of the Act; injury is presumed from the violation. *Id.* at 250 (quoting *Dzadovsky v. Lyons Ford Sales. Inc.*, 593 F.2d 538, 539 (3d Cir. 1979)). The TILA "should be construed liberally in favor of the consumer." *Ramadan v. The Chase Manhattan Corp*, 156 F.3d 499, 502 (3d Cir. 1998), but deference must be given to interpretations of the Federal Reserve Board, to whom Congress has granted "expansive authority" to promulgate regulations. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 557 & 560 (1980).

Plaintiff asserts defendants' leases have violated the CLA because: 1) the formula to calculate the Early Termination Charge does not comply with the disclosure requirements; and 2) the Early Termination Charge clause fails to define the term "residual value."

A. The Early Termination Charge

In interpreting a statutory provision, a court first considers the language of the statute and whether it clearly expresses the intent of Congress. *See Chevron, U. S .A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). The CLA is ambiguous regarding whether a closed-end lease must explain or define the "constant yield method." Therefore, we look next to any regulations of an agency to whom Congress expressly delegated authority.

In 1996, Congress granted the Federal Reserve Board ("FRB") power to promulgate regulations under the CLA. *See* 15 U.S.C. § 1667f. Regulation M, 12 C.F.R. § 213.4, addresses disclosure requirements. This formal regulation, as of the date the leases at issue were signed, stated:

> (g) Specific disclosure requirements. In any lease subject to this section, the following items, as applicable, shall be disclosed:
>
> > (12) A statement of the conditions under which the lessee or lessor may terminate the lease prior to the end of the lease term and the amount or method of determining the amount of any penalty or other charge for early termination.

12 C.F.R. § 213.4(g) (12) (1994 & 1995). These "disclosures shall be made clearly, conspicuously, [and] in meaningful sequence." *Id.* at § 213.4(a)(l).

Even when administrative agency interpretations are not formally stated, informal interpretations are given some deference if made "in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge." *Cleary v. Waldman*, 167 F.3d 801, 807-08 (3d Cir. 1999) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). These interpretations are not controlling, but provide "a body of experience and informed judgment to which courts and

litigants may properly resort for guidance." *Skidmore*, 323 U.S. at 140. The interpretation must also be reasonable and "consistent with other agency pronouncements and [in furtherance of] the purposes of the Act." *Cleary*, 167 F.3d at 808.

The 1994 official staff commentary states that "clearly, conspicuously, and in meaningful sequence" means "that disclosures be in a reasonably understandable form," explaining that "while the regulation requires no particular mathematical progression or format, the disclosures must be presented in a way that does not obscure the relationship of the terms to each other." 12 C.F.R. Pt. 213, Supp. I-Cl-l. This requires clarity and full presentation of terms, not full presentation of the details or formulation of a mathematical equation. For the early termination clause to be "clearly, conspicuously, and in meaningful sequence," it must be visible to the lessee and in a readable format; it need not be simple enough for the lessee to do the mathematical calculations of the exact amount.

"[I]f the statute is silent or ambiguous," the court decides "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Regulations promulgated by an agency to whom Congress has expressly delegated authority "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

The parties do not argue that the regulations of the FRB "are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. They are consistent with the CLA and its purpose to protect consumers. Regulation M and the official staff commentary are entitled to deference by this court.

Addressing an identical issue, *Channell v. Citicorp. Nat'l Serv., Inc.*, 89 F.3d 379, 383 (7th Cir. 1996), held that the CLA and Regulation M "permit a lessor to name a method [of

calculation] without providing an elaboration of the method's operation." In *Channell*, the lease referred to use of "the Sum-of-the-Digits method," or "Rule of 78s," to calculate the early termination charge. Plaintiffs argued the CLA required the lease to disclose the calculation by the Sum-of-the-Digits method. The court first considered the plain language of the CLA; a lessor must disclose "the amount or method of determining any penalty or other charge." 15 U.S.C. § 1667a(11); *see also* 12 C.F.R. § 213.4(g)(11) (disclosure of "the amount or method of determining the amount of any penalty or other charge"). The court then balanced the need for disclosure to consumers with the desire to avoid "information overload." *Channell*, 89 F.3d at 382 (citing *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980)). Finding reference to a method without further explanation of the mathematical calculation permitted the consumer to comparison shop for lease terms, the court concluded that the lease "may disclose either the amount or the method of getting to an amount." *Channell*, 89 F.3d at 382. It held Regulation M required no explanation of the application of the method.[3] *Id.*

The term "clear and conspicuous" is not defined either in the CLA or Regulation M, so the *Channell* court adopted a Uniform Commercial Code § 1-201(10) definition: "so written that a reasonable person against whom it is to operate ought to have noticed it." The court concluded that "clear and conspicuous" means visible or noticeable, not simple or easy to apply. *Channell*, 89 F.3d at 382.

In *Lundquist v. Security Pacific Automotive Financial Servs. Corp.* 993 F.2d 11, 13 (2d Cir. 1993), the court considered the following lease provision:

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[3] The staff commentary to Regulation M now specifically permits the lessor to refer to "a generally accepted method," like the "constant yield method." *See* 12 C.F.R. Pt. 213, Supp. I. This provision is not retroactive so it does not apply to the present action. *Channell*, 89 F.3d at 383.

16. EARLY TERMINATION LIABILITY

At any time after I [the lessee] sign this lease, you [Security Pacific] may terminate it if any of the conditions described in Item 22 occur or this lease is in default as described in Item 23.

I agree that my payment liability upon early termination will be the sum of:

(a) A termination fee of $250; plus

(b) Any monthly lease payments already due you which are unpaid and any other amounts arising from my failure to keep my promises under this lease; plus

(c) The amount, if any, by which the sum of the Adjusted Lease Balance as described in Item 8, plus one Base Payment, Item 3.A., exceeds the Realized Value, as determined in accordance with Item 15; plus

(d) Any official fees and taxes imposed in connection with lease termination (for example, sales/use taxes due on a deficiency balance under (c)).

In interpreting this provision, the *Lundquist* court, after quoting the applicable provisions of the CLA, Regulation M, and the staff commentary, concluded:

> [The] lease disclosures are not reasonably understandable. They are "confusing, unduly complicated, and unnecessarily convoluted." In particular, the termination formula in Item 16(c) of the lease is a Byzantine formula, beyond the understanding of the average consumer.

Id. at 15.

The provision interpreted in *Lundquist* is distinguishable from the one this court is asked to interpret. That provision involved more steps and more complicated calculations, not a method of calculation such as the "constant yield method."

The *Lundquist* court, in granting summary judgment for plaintiff, did not consider whether the CLA requires the lessor to explain a named method. *See Channell*, 89 F.3d at 383. To the extent tension does exist between *Lundquist* and *Channell*, *Channell* seems a better interpretation of the CLA requirements.

The 1994 and 1997 leases were not required to define "constant yield method" because the lessor elected to give the method of calculation rather than an exact amount. The calculation of the Early Termination Charge was stated "clearly, conspicuously, and in meaningful sequence." [4]

The lease provision states each step in the calculation of the early termination charge. Reading the provision, the lessee can easily gather the following formula, or method of calculating the charge:

> 1. (Monthly payments + residual value) (discounted to present value using the "constant yield method") = Adjusted Lease Balance (ALB)
>
> 2 ALB — Realized Value (proceeds the lessor receives for the vehicle) = Early Termination Charge.

The consumer may not understand the meaning of "constant yield method," but the clause is otherwise decipherable. Explaining the "constant yield method," a method well known in the industry, rather than merely naming it would cause more confusion than it resolved. As NMAC stated at oral argument, the mathematical formula is "imbedded in . . . computer software." The purpose of this method under the lease is to discount to present value; this requires complex calculations involving the time value of money. *See* 60 F.R. 48752, 48756. Calculating the time value

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[4] Plaintiff also objects that the lease requires "numerous unnecessary calculations." The CLA and Regulation M do not prohibit unnecessary calculations, nor does plaintiff identify any.

of money mandates some prediction of future events and reliance upon actuarial formulae involving complex mathematics. *See* Casualty Society of Actuaries, *What is an Actuary?* (visited April 19, 1999) <http://www.casact.org/career/what.htm>. The CLA does not require the lessor to explain complex mathematics in the lease; stating the method used satisfies the disclosure requirement.[5]

B. Defining "Residual Value"

At the time of the 1994 lease, neither the CLA nor Regulation M expressly required that key terms be defined in the lease. After January, 1997, the FRB revised Regulation M to require a lessor to define "residual value" when used in calculating the periodic payment, but not in relation to the early termination penalty. *Compare* 12 C.F.R. § 213.4(f) (4) *with* 12 C.F.R. § 213.4(g) (4).

Prior to amendment, the regulation specifically required definition of "residual value" in an open-end lease, 12 C.F.R. § 213.4(g) (15), but not in a closed-end lease, at issue here. The FRB was aware of the use of the term "residual value" in leases when it required the definition in open-end leases but not in closed-end leases.

> But legislative silence is not always the result of a lack of prescience; it may instead betoken permission or, perhaps, considered abstention from regulation. In that event, judges are not accredited to supersede Congress or the appropriate agency by embellishing upon the regulatory scheme. Accordingly, caution must temper judicial creativity in the face of legislative or regulatory silence.

Milhollin, 444 U.S. at 565.

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[5] As of October 1, 1997, if the lessor names a method of calculation in the lease, a lessor must "provide a written explanation of that method if requested by the consumer". *See* 12 C.F.R. Pt. 213, Supp. I. As of the date of the transactions at issue, this provision was not in effect.

Plaintiff cites *Anderson v. Ford Motor Credit Corp.*, 593 A.[2d] 678 (Md. 1991) to support his argument that a closed-end lease must define "residual value." In *Anderson*, a state court allowed lack of disclosure of the term "residual value" in a default clause as a defense when the lessor sued for default payments. The term "residual value" was used to state the method by which the early termination charge, necessary to determine the default charge, was calculated. In interpreting the CLA, the *Anderson* court considered a Senate report requiring full disclosure of charges, Regulation M, and a treatise on the TILA and concluded that "the method or amount in determining the charge must be furnished." *See id.* at 681 (quoting S. Rep. No. 590, 2d Sess. 5, reprinted in 1976 U.S. Code Cong. & Admin. News 435; 12 C.F.R. § 213.4(g)(12)); K. Keest & E. Sarason, Truth in Lending, § 9.3.6.12, at 339 (1989).

The *Anderson* court required the lessor to disclose the actual calculated amount of the residual value, not a mathematical explanation or definition of the term. Quoting a treatise on the TILA, the court found that "[w]henever a key number in the early termination formula is left blank or not discussed anywhere in the contract, this is a certain disclosure violation." *Id.* (quoting Keest & Sarason, Truth in Lending, § 9.3.6.12, at 339). The court then mandated disclosure of the actual residual value amount in case of default because "[s]imply telling the lessees that their liability would be predicated upon the residual value, without disclosing that predetermined value in writing, does not satisfy the requirements of § 1667a." *Anderson*, 593 A.2d at 681.

Neither the CLA nor Regulation M require that every "key number" used in calculating a charge be disclosed. *See* 15 U.S.C. § 1667a(11); 12 C.F.R. § 213.4(g)(12). In light of the regulation's silence regarding "residual value," a concept familiar to the FRB, this court is unwilling to interpret the regulation as broadly as plaintiff argues and *Anderson* holds.

Plaintiff fears that if defendants are not required to define the term "residual value" and disclose the amount, defendants may arbitrarily select a value. But Regulation M requires that charges be reasonable, 12 C.F.R. § 213.4(g)(1); an Early Termination Charge cannot be reasonable if the values by which it is calculated are unreasonable. Plaintiff does not contend here that the residual value used was unreasonable. The term "residual values" is not void of meaning to the average consumer; it means whatever value remains in the vehicle when the lease terminates. The CLA and Regulation M do not require further definition.

IV. Amendment of the Complaint

Plaintiff moves to amend his complaint to add a claim for violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 Pa. Con. Stat. Ann. § 202-1—202-8. Because this court will grant summary judgment in favor of defendants, it declines exercising supplemental jurisdiction under 28 U.S.C. §1367(c). Plaintiff's motion to amend the complaint will be denied without prejudice.

CONCLUSION

Reitenbaugh Dealership is liable under the CLA as the lessor and an arranger of the lease; it is regularly engaged in leasing. However, the CLA, as interpreted by Regulation M, does not require that defendants explain the "constant yield method" used in the 1994 and 1997 leases signed by Applebaum, nor does the statute require the lessor to define the term "residual value" in a closed-end lease.

This court declines to exercise supplemental jurisdiction over an UTPCPL claim.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 97-7256

LEONARD APPLEBAUM

v.

NISSAN MOTOR ACCEPTANCE CORP. &
REITENBAUGH ENTERPRISES, INC.

ORDER

AND NOW, this 21st day of April, 1999, upon consideration of plaintiff's and defendants' cross-motions for summary judgment, all responses thereto, and after a hearing during which counsel for both sides were heard, and in accordance with the attached Memorandum, it is hereby ORDERED that:

1. The motion for summary judgment of defendant Nissan Motor Acceptance Corp. is GRANTED.

2. The motion for summary judgment of Defendant Reitenbaugh Enterprises, Inc. is GRANTED.

2. Plaintiff's motion for summary judgment is DENIED.

3. Judgment is entered in favor of defendant and against plaintiff.

4. Plaintiff's motion to amend his complaint is DENIED without prejudice to any action filed in state court.

5. The Clerk is directed to mark this action CLOSED.

Shapiro, S.J

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1373

LEONARD APPLEBAUM,

Appellant

v.

NISSAN MOTOR ACCEPTANCE CORPORATION;
REITENBAUGH ENTERPRISES, INC.

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge*, SLOVITER, MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, and FUENTES, *Circuit Judges*.

The petition for rehearing filed by appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ [Illegible]
Circuit Judge

Dated: Oct. 25, 2000

Supreme Court, U.S.
FILED
MAY 25 2001
OFFICE OF THE CLERK

(2)

No. 00-1484

In The

Supreme Court of the United States

NISSAN MOTOR ACCEPTANCE CORPORATION,

Petitioner,

v.

LEONARD APPLEBAUM,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE CASE

This case was borne out of the frustration of an individual consumer, Applebaum, in trying to get someone, anyone, to tell him how it was that NMAC claimed he owed $5611 in early termination charges when he traded in his 1994 Nissan early for a 1997 Nissan. The dealer, Reitenbaugh could not explain the calculation and referred Applebaum to NMAC. No one at NMAC could, or would explain the charge. When Applebaum's lawyer wrote to NMAC for an explanation of specifically how the charge was computed, NMAC refused. NMAC claimed that the law did not require an explanation. Incredibly, NMAC also claimed the computation of the charge was *proprietary*. App. 4a-5a; R.9-10.

Applebaum sued under the Consumer Leasing Act, 15 U.S.C. § 1667 ("CLA") and implementing Regulation M of the Federal Reserve Board ("Board") claiming, *inter alia*, that the lease failed to meet the disclosure requirements of the CLA. Unlike many other company's leases, the closed-end lease constructed by NMAC included the vehicle's residual value as an essential term in the calculation of the lessee's early termination liability.

Pursuant to Eastern District of Pennsylvania Local Rule 53.2, the case was assigned for the district's mandatory arbitration program. The arbitrators found in favor of Applebaum on one disclosure claim and awarded him $1000.

From this modest award, NMAC appealed and demanded a trial *de novo* in the District Court, where it thereafter sought summary judgment. The District Court thereafter held in part that the assigned residual of the

car, a constituent term in NMAC's early termination liability clause, did not need to be defined nor disclosed.[1] App. 28a-30a.

"Residual Value" means "the end-of-term value of the vehicle established at the beginning of the lease and used in calculating [the lessee's] base monthly payment." App. 15a. This residual value is critical in this particular lease contract because it is an integral part of the formula for the lessee's early termination liability. App. 16a-17a. On this point, the Court of Appeals unanimously reversed, holding that the CLA and Regulation M dictate that residual value, a figure known to NMAC at lease inception, must be disclosed in order to make the lease " 'reasonably understandable' in any meaningful sense of the term." App. 15a.

NMAC sought rehearing or *en banc* reconsideration, but that application was denied.

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[1] In finding that the Residual Value need not be disclosed under this particular lease formula, the learned Trial Court plainly misunderstood the meaning and import of the term. It held that Residual Value means "whatever value remains in the vehicle when the lease terminates. The CLA and Regulation M do not require further definition." App. 30a. The Court of Appeals held and NMAC now acknowledges that this basic definition by the Trial Court was incorrect. (Pet. 7; App. 15a).

REASONS FOR DENYING THE WRIT

In interpreting the Consumer Leasing Act and an implementing regulation which the Federal Reserve Board repealed in 1996, the Court of Appeals held only that "meaningful disclosure" of lease costs required NMAC to disclose in its closed-end consumer leases the residual value it used in setting lease terms. 15 U.S.C. § 1601(b). The Court did not ignore any regulation or Board commentary. Rather, the Court correctly found that the Board had not spoken to this particular disclosure issue. The Court also correctly found that the peculiar structure of the NMAC early termination clause made the residual value figure critical to "meaningful disclosure" of the lease terms. This common sense holding is far from extraordinary; the Board itself made "residual value" disclosure mandatory for all leases when it issued new regulations in 1997.

There is no conflict between the circuits. On the contrary, the Seventh Circuit's *Channell*[2] decision cited by Petitioner did not involve nor address residual values. In those areas where the decision below and *Channell* did intersect, the Third Circuit agreed with and adopted the Seventh Circuit's holding in all material respects.

Apart from having little future commercial significance, this case also has little practical importance. As a result of the Court of Appeals' ruling, NMAC's disclosure violation resulted in an award of statutory damages of

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[2] *Channell v. Citicorp National Services, Inc.*, 89 F.3d 379 (7th Cir. 1996).

$2000 to Applebaum. Virtually all leases using this outdated format have since expired. As such, this case presents neither issues of ongoing significance nor of current commercial importance.

ARGUMENT

A. The Regulation For Which Petitioner Seeks Review Was Repealed And Substantially Revised In 1996, Making The Issue – Though Correctly Decided – Certain Not To Recur.

Petitioner challenges the Court of Appeals interpretation of a version of Regulation M which was in effect from 1982 until its repeal in 1996. 12 C.F.R. § 213.4 (1995). The regulation then in effect did not expressly require nor excuse disclosure of a vehicle's residual value in a closed-end consumer lease. While the decision of the Court of Appeals was entirely correct and well reasoned, *see infra*, the issue is all but moot as the regulation was repealed and replaced by Regulations effective October 31, 1996. 61 Fed. Reg. 52246 (1996). Compliance with the revised regulations was optional until January 1, 1998. 62 Fed. Reg. 51006 (1997), 62 Fed. Reg. 53733 (1997). The new regulations, as amended, completely supersede and renumber the old regulations for all consumer leases beginning not later than January 1, 1998.[3]

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[3] While the amended regulation is not dispositive of the interpretation of the former regulation, the new regulation expressly requires the definition and amount of the vehicle's residual value to be plainly disclosed in all leases covered by the CLA. *See* 12 C.F.R. § 213.4(f)(4) (1998).

Thus, the great majority of leases subject to the repealed regulation have already expired or will expire imminently. While respondent does not suggest the issue is legally moot, it is for all practical purposes no longer an issue, save lingering litigation over the peculiar early termination provision of the old-style NMAC leases. Put otherwise, the Board itself settled this issue in 1996.

Although NMAC asserts that several new lawsuits have been filed allegedly "as a consequence of the Court of Appeals decision" (Pet 15 n.5), those cases (which involve only NMAC's leases) make a number of legal challenges to the NMAC lease and to charges levied at early termination, not simply the failure to disclose residual value. Contrary to NMAC's claim that the decision below was "enormously significant,"(Pet 14) it is virtually assured that the Court's narrow holding will be quite insignificant beyond the parochial interests of NMAC.

B. There Is No Circuit Conflict. The Seventh Circuit Decision Cited By Petitioner Did Not Address Residual Values In Leases; In Other Material Respects, The Court Below Agreed With The Decision Of The Seventh Circuit.

Contrary to the Petitioner's assertion, the decision below is not in conflict with the decision of the Court of Appeals for the Seventh Circuit in any material way. Rather, NMAC confuses the *holding* of *Channell* and *Applebaum* – which dealt with different CLA issues – with part of the Court's rationale. The holding of the Court below was that "[i]n order to discharge their disclosure obligations, the defendants in this case were required to

reveal the residual value that had been assigned to Applebaum's cars." App. 15a. The decision in *Channell*, by contrast, had nothing to do with whether the vehicle's residual value had to be disclosed. As set forth in the opening paragraph of the *Channell* decision:

> This case under the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667e, presents three questions. First, must a lessor that uses the sum-of-the-digits method (also known as the Rule of 78s) to calculate unearned interest explain what the method entails? Second, after disclosing that it will use the Rule of 78s, must the lessor actually use it? Third, may a District Court use the supplemental jurisdiction, 28 U.S.C. § 1367, to order members of a plaintiff class (which becomes a defendant class in a counterclaim) to pay what they owe on consumer leases?

Channell, 89 F.3d at 380.

On the other issue, comprehensibility, the *Applebaum* Court agreed with the *Channell* Court, rejecting a more consumer-friendly interpretation by the Court of Appeals for the Second Circuit in *Lundquist v. Security Pacific Automotive Fin. Serv.*, 993 F.2d 11 (2d Cir. 1993).[4] App. 11a. Both the Court below and the Seventh Circuit agreed that the purpose of the CLA and Reg. M was, in part, to

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[4] NMAC argues that the Court of Appeals took a "middle ground somewhere between *Channell* and *Lundquist*." (Pet 17 n.8) Yet even the more liberal construction of the "reasonably understandable" requirement taken by the *Lundquist* Court was well within proper interpretation of Reg. M, and did not merit review by this Court. *Lundquist, cert. denied*, 510 U.S. 959 (1993).

provide the lessee with sufficient information to determine what his cost or options may be at early termination. Minor disagreement over the possible meanings of the word "clear" in the old regulation is not material and does not warrant further review.

C. The Decision Of The Court Of Appeals Was Entirely Correct. Neither The CLA Nor The Board Have Held That Residual Value May Be Omitted Where The Lessor Implicates The Term In Its Formula.

Neither the CLA nor the (repealed) regulations of the Board state that a lessor need not disclose residual value in a closed-end lease where the lessor utilizes residual value as part of the consumer's early-termination liability. NMAC claims however that the Court of Appeals should have inferred (from silence) that the Board had made such a determination and then deferred to that inferred finding. Such an inference would not be warranted. The Court of Appeals reviewed the statutory language and the legislative history:

> The purpose of the legislation is to provide consumers with meaningful information about the component and aggregate costs of consumer leases, so that they can make better informed choices between leases, and between leases and credit sales. *See* S. Rep. No. 94-590 (1976), *reprinted in* 1976 U.S.C.C.A.N. 431, 432.

App. 6a. The legislative history, with much input from the Board, makes clear that:

BEST AVA

> [C]onsumers need protection not only against inadequate cost disclosure, but also against miscalculations of residual value that entice them into leases with low monthly payments but that turn out to involve large bailoon payment obligations. . . . S. Rep. No. 94-590 (1976) *reprinted in* 1976 U.S.C.C.A.N. 431, 433-34.

Given this clear legislative intent and the statutory command of meaningful disclosure, 15 U.S.C. § 1601(b), it is illogical to infer that the Board would affirmatively determine, *sub silentio*, that residual value should not be disclosed in a lease where the lessor chooses to implicate that value. There is no basis to conclude that the Board intended that such leases be devoid of the very figure necessary for the consumer to shop and limit his or her liability upon early termination. To the contrary, the purpose of Reg. M is to assure meaningful disclosure and "to delimit the ultimate liability of lessees in leasing . . . " 12 C.F.R. § 213.1(b) (1995).

Even if NMAC were somehow correct about the inference to be drawn from the Board's failure to speak to inclusion of residual value in closed-end leases before 1996 (which they are not) such an implicit conclusion would not be entitled to deference. Only formal adjudications and notice-and-comment rule-making, which have the force of law, warrant deference. *Christensen v. Harris Co.*, 529 U.S 576 (2000). Enforcement guidelines, policy statements (neither of which are even present here) are not entitled to deference, but only to "respect" and then only to the extent those interpretations have the "power to persuade" *Id.* at 587. Silence on a subject, without explanation, is far from persuasive.

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There is no issue over claimed Court "modification" of Board disclosure requirements which would warrant review (Pet. 19) because the Board has never held that residual value need not be disclosed in a closed-end lease. On the contrary, since 1997, the Board has required that all closed-end leases must disclose residual value. 12 C.F.R. § 213.4(f)(4) (1998).

D. The Court Of Appeals Decision Does Not Conflict With The Supreme Court's Holding In *Ford Motor Credit Co. v. Milhollin*

Petitioner is incorrect when it asserts that this Court should accept review because the Court of Appeals failed to follow this Court's ruling in *Ford Motor Credit Corp. v. Milhollin*, 444 U.S. 555 (1980). The Court of Appeals addressed and carefully followed *Milhollin*. *See* App. 6a n.4, 16a. In *Milhollin*, the Board had issued published staff interpretations in which the Board "consistently construed" its regulation that the (challenged) right of acceleration need not be disclosed. *Id.* at 557. The Court of Appeals for the Ninth Circuit refused to follow the Board's published interpretation. In reversing, this Court in *Milhollin* held only that the Board's affirmative, published interpretation that disclosure was not required should have been granted deference. *Id.* at 569-70.

By contrast here, the Board had *not issued* any regulation or commentary expressing a view that residual value may be omitted in a lease whose early termination formula directly implicates it. There is no basis for NMAC's claim that the Board "deliberately decided not to" require disclosure of residual values here. (Pet. 24). NMAC cited no authority for this claim in its petition nor below. This

Court recognized in *Milhollin* that "[e]ven Regulation Z . . . cannot speak explicitly to every credit disclosure issue." *Id.* at 560. As such, it "is commonplace that Courts will further legislative goals by filling the interstitial silences within a statute or a regulation." *Id.* at 565. Following *Milhollin*, the Court of Appeals wisely held that the Board's failure specifically to require the disclosure of residual value in closed-end leases "cannot reasonably be interpreted as a considered decision that disclosure is not necessary . . . " App. 17a.

Petitioner also suggests that it should be insulated from liability because NMAC allegedly used "model forms" promulgated by the Board. (Pet. 9). There is nothing in the record whatever that NMAC ever relied upon or used model forms. More important, this defense was never presented below. As such, it is waived. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

NMAC's liability instantly to Applebaum as a result of the Court of Appeals' ruling was $2,000 plus counsel fees. 15 U.S.C. § 1667d; 15 U.S.C. § 1640(a)(2). Quite apart from the Court's sound reasoning, there is no reason to believe that the Court of Appeals' decision pertaining to a single disclosure in a particular form of lease – out of use since 1997 – will have any far-reaching impact which would warrant review by this Court.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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(3)

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No. 00-1484

In the Supreme Court of the United States

NISSAN MOTOR ACCEPTANCE CORPORATION,
Petitioner,

v.

LEONARD APPLEBAUM,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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CORPORATE DISCLOSURE STATEMENT

Under this Court's Rule 29.6, petitioner's parent corporations are listed in the Rule 29.6 statement included in the petition for a writ of certiorari.

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INTRODUCTION

Two fundamental errors pervade each argument advanced in respondent's brief in opposition. First, in an effort to minimize the significance of the issues raised, respondent dwells on the fact that portions of the Federal Reserve Board's Regulation M have been amended since the leases at issue in this case were signed. Respondent fails to acknowledge, however, that these regulatory amendments did not alter the statutory and regulatory requirement that disclosures be made in a "clear and conspicuous manner." But it is this very provision that the Third and Seventh Circuits have interpreted inconsistently, and it is this conflict that petitioner, Nissan Motor Acceptance Corporation ("NMAC"), asks the Court to resolve. Respondent's failure to acknowledge that the central statutory and regulatory provision remains unchanged in the amended regulations renders his opposition largely unresponsive to the question presented in the petition.

Respondent's claim that the issue in this case is "all but moot" is in error. Even from the narrow perspective of disclosures of "residual value," thousands of leases entered before the regulatory change remain in effect, and many are the subject of litigation, including purported class actions. Moreover, even if new leases signed now will disclose the residual value amount in keeping with the revised regulation, the broader issue of whether, in this highly regulated area, courts should be permitted after the fact to add new substantive disclosure requirements in the guise of interpreting the "clear and conspicuous manner" requirement remains not only very much alive, but of critical importance to the leasing industry.

Second, respondent never even mentions, much less explains, the fact that the Federal Reserve Board regulations required residual value to be defined in open-end leases before the 1996 amendments. The Board's failure to require

similar disclosure in closed-end leases such as the one at issue here hardly can be treated as accidental. To the contrary, the governing regulatory agency elected not to impose a parallel requirement for closed-end leases, and that decision is entitled to deference from the courts. Regulated entities like NMAC cannot be expected to know by intuition that, although the Board has chosen not to require a particular disclosure, a court later will conclude that it was mandatory after all.

Rather than addressing the arguments actually made in the petition, respondent accuses NMAC of arguing that the pre-amendment Regulation M provided that "residual value *should not be* disclosed in a lease where the lessor chooses to implicate that value." Opp. 8 (emphasis added). Of course, NMAC argued no such thing. The issue is not whether the Board precluded or disapproved the disclosure or said that it should not be made; rather, the question is whether a court should *require* a lessor to make a further disclosure even where the Board has not done so. As this Court has recognized in the past, "[m]eaningful disclosure does not mean more disclosure. Rather, it describes a balance between 'competing considerations of complete disclosure . . . and the need to avoid . . . [information overload.]'" *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980).

The petition seeks review of an important question of statutory construction over which the courts of appeals are divided. Review by this Court is needed if lessors are to be able reliably to determine in advance whether their leases comply with the Consumer Leasing Act ("CLA") and Regulation M, regardless of the geographical region in which their leases are executed, and without having to fear judicial second-guessing after many thousands of transactions have been completed.

I. THE THIRD AND SEVENTH CIRCUITS ARE DIVIDED OVER THE APPROPRIATE INTERPRETATION OF THE STATUTORY "CLEAR AND CONSPICUOUS MANNER" REQUIREMENT

Respondent denies that the holding below conflicts with the Seventh Circuit's decision in *Channell v. Citicorp National Services, Inc.*, 89 F.3d 379 (7th Cir. 1996), observing that *Channell* "had nothing to do with whether the vehicle's residual value had to be disclosed." Opp. 6. But this takes far too limited a view of the sharp disparity between the approach of the court below and that of the Seventh Circuit in *Channell*. The two courts of appeals disagreed over the meaning of the CLA's requirement that all disclosures be made in a "clear and conspicuous manner." *See* 15 U.S.C. 1667a. Under *Channell*, this requirement refers to "the mode of presentation," and means "visible, not simple." 89 F.3d at 382. If the *Channell* interpretation were applied in this case, NMAC would prevail. *See* App. 10a, 12a. But the court below held that, to satisfy the statutory "clear and conspicuous manner" standard, the language used must be not only legible, but also "reasonably understandable." App. 11a. For this reason, the court held, NMAC was required to disclose the amount of residual value that had been assigned to respondent's car. App. 15a.

These holdings are plainly in conflict. What's more, both *Channell* and the court below also declined to adopt the Second Circuit's statement in *Lundquist v. Security Pacific Automotive Financial Services*, 993 F.2d 11, 15 (2d Cir.), *cert. denied*, 510 U.S. 159 (1993), that disclosures must be simple enough for the average consumer to grasp. *See* App. 11a, 28a; *Channell*, 89 F.3d at 382, 383; *Jordan v. Toyota*

Motor Credit Corp., 236 F.3d 866, 867 (7th Cir. 2001).[1] Respondent's contention that review should be denied here because it was denied in *Lundquist* is insupportable. *See* Opp. 6 n.4. When this Court denied review in *Lundquist*, the oldest of these three cases, there obviously was no disagreement among the circuits. Now, in contrast, three courts of appeals have developed three different standards for determining whether the disclosure requirements have been satisfied. Review by this Court is necessary to resolve the disagreement among the lower courts and to enable lessors to know in advance the legal principles that will govern the thousands of standard form leases being entered every day.

The need for review is illustrated by a case that was decided earlier this year, after the petition in this case was filed but before respondent filed his Brief in Opposition. In *Clement v. American Honda Finance Corporation*, Civ. No. 3:95CV660SRU, 2001 WL 539582 (D. Conn. March 30, 2001), the plaintiff claimed that her lease violated the CLA and Regulation M because, among other things, the early-termination provision was not presented in a clear and conspicuous manner. The district court felt constrained to find a violation of the CLA because the clause at issue was almost identical to the one struck down by the Second Circuit in *Lundquist*. *Id.* at *5. The court acknowledged the circuit split over the meaning of "clear and conspicuous," noting that "[t]here is no question that if this case were decided in the Seventh Circuit a different outcome would be required." *Id.*

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[1] Inexplicably, respondent asserts (without citation) that both *Channell* and the court below agree that the purpose of the provision requiring disclosure of the lessee's liability at early termination in the CLA and Regulation M was to enable the lessee to determine on his own the amount of the early-termination charge. Opp. 6-7. In fact, as the citations in the text make clear, neither the court below nor the Seventh Circuit believed that the statute or the regulations require sufficient disclosure to allow the lessee to perform the mathematical calculation described in the lease.

(citing *Channell*, 89 F.3d at 383). The court suggested, however, that the same could not be said for the Third Circuit, which, according to *Clement*, applies a standard that is closer to *Lundquist* than to *Channell*. The court explained:

> In reaching the conclusion that the AHFC lease violates the CLA, it is not necessary to accept Clement's assertion that *Lundquist* holds that the "standard for determining whether a disclosure complies with the CLA is whether the formula is '*beyond the understanding of the ordinary consumer*.'" Pl. Mem. at 2 (quoting *Lundquist*, 993 F.2d at 14) (emphasis added). Whether the "understanding of the ordinary consumer" reference was a holding or dicta, *Lundquist* did hold that lease disclosures must "be reasonably understandable," *id.* at 15, which AHFC's disclosures are not. *See also Applebaum*, 226 F.3d at 220 (interpreting "reasonably understandable form" language of 12 C.F.R. pt. 213, supp. I, § 213.4(a)(1), and holding that "the method of calculating an early termination provision must not only be legible; it must also be 'reasonably understandable,'" not necessarily within "the understanding of the average consumer" but "reasonable depend[ing] on the surrounding circumstances.").

2001 WL 539582 at *6.

As *Clement* demonstrates, respondent's contention that the court of appeals' decision does not conflict with *Channell* is erroneous. Although *Channell* did not involve the term "residual value," *Channell*, *Lundquist*, and the court below all analyzed whether a specific early-termination provision was presented in a clear and conspicuous manner as required by the CLA and Regulation M. In each case, the court applied a different test to answer that question. That is a conflict that deserves resolution by this Court.

II. THE AMENDMENTS TO REGULATION M DO NOT OBVIATE THE NEED FOR REVIEW

Respondent attempts to minimize the importance of this case by pointing to the 1996 amendments to Regulation M.[2] Opp. 4. But the 1996 amendments involved only one aspect of this case. By requiring all leases—even closed-end leases—to disclose the amount of residual value assigned at the beginning of the lease term, the amendments made it unlikely that the precise lease form at issue here will be used again in the future. But this, of course, does not solve the problem created by the hundreds of thousands of leases that are already in effect, or that are the subject of ongoing purported class-action litigation. *See* Pet. 14 n.5. Although respondent attempts to distinguish other pending cases by stating that they involve claims in addition to the disclosure issue in this case, Opp. 5, the Florida state court action, which allegedly challenges more than 200,000 leases, makes virtually identical claims to those brought by respondent in this case. *See LaFramboise v. NMAC*, No. 00-007609 (Orange County Cir. Ct. filed Oct. 17, 2000).

Moreover, as explained above, the principal point of contention in this case is whether disclosures that are "clear and conspicuous" under *Channell* are sufficient to satisfy the lessor's disclosure obligations in the absence of a specific provision in the statute or regulations requiring more detailed presentation. This issue will recur, because the "clear and conspicuous" standard remains the operative standard for determining the sufficiency of disclosures required by the CLA and Regulation M. In addition, as mentioned in the

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[2] Respondent also tries to diminish the case's significance by belittling the amount in controversy, which he describes first as $1,000, Opp. 1, and later as $2,000, Opp. 4, before finally acknowledging that the court of appeals awarded $2,000 plus counsel fees, Opp. 10. Counsel fees also represent a substantial component of the recovery sought in the other pending cases cited in the petition.

petition, this standard is also used in a number of other regulatory regimes. *See* Pet. 21. Thus, fallout from the court of appeals' decision in this case will not be limited to cases involving "old-style NMAC leases" as respondent claims, Opp. 5, or even to cases under the CLA.

III. THE PRINCIPLE OF JUDICIAL RESTRAINT ARTICULATED IN *FORD MOTOR CREDIT COMPANY V. MILHOLLIN* SHOULD BE FOLLOWED IN THIS CASE

Respondent contends that the court of appeals was not required to defer to the Federal Reserve Board's decision to omit residual value in closed-end leases from Regulation M's detailed list of "specific disclosure requirements" because the Board did not publish staff commentary explaining its decision to do so. *See* Opp. 9-10. Although this Court, in *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980), did have the benefit of published commentary discussing the staff's interpretation of the matter there at issue, courts have applied the principles established in *Ford Motor* even where such express guidance from the agency is lacking.[3] These courts have found the absence of any regulatory provision imposing a particular requirement sufficient to indicate that the agency construed the statute as not imposing any such obligation.[4]

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[3] *See, e.g., Ritter v. Durand Chevrolet, Inc.*, 945 F. Supp. 381, 384 (D. Mass. 1996); *Gaydos v. Huntington Nat'l Bank*, 941 F. Supp. 669, 677 (N.D. Ohio 1996). The *Gaydos* court observed that the defendant's lease contained all of the information specifically set forth in the published model lease. *Id.* at 676. The same can be said in this case. As noted in the petition, the pre-1996 model lease contained an early-termination clause that provided simply that "[t]he charge for early termination is _____." 12 C.F.R. Pt. 213, App. C, Form C-2 at 357 (1995).

[4] *Ritter*, 945 F. Supp. at 384; *Gaydos*, 941 F. Supp. at 677; *see In re Thebeau*, 3 B.R. 537, 538 (Bankr. E.D. Ark. 1980); *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336, 345 (1982)

Respondent's reliance on *Christensen v. Harris County*, 529 U.S. 576 (2000), is misplaced. *See* Opp. 8. First, *Chistensen* did not purport to detract in any way from this Court's holding in *Ford Motor* that, where the Truth in Lending Act is concerned, the Federal Reserve Board's interpretations, even if informal, are treated as "authoritative." 444 U.S. at 567-68; *see id.* at 565. The Court based this conclusion on statutory provisions allowing lessors to rely in good faith on such interpretations.[5] *Id.* at 566-67; *see* 15 U.S.C. § 1640(f); *see also* 15 U.S.C. § 1667f(b). Second, the interpretation of the CLA advanced by NMAC is embodied in the formal regulations themselves, and thus is entitled to deference even under *Christensen*. *See* 529 U.S. at 587 ("Of course, the framework of deference set forth in *Chevron* [*U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)] does apply to an agency interpretation contained in a regulation.").

Moreover, although the court of appeals below did not have the benefit of explicit staff commentary from the Board stating that residual value need not be disclosed in closed-end leases, it was not operating in a vacuum. First, the staff commentary did emphasize that the statutory "clear and conspicuous manner" requirement focused on the "form" in which the disclosures were made. 12 C.F.R. Pt. 213, Supp. I, § 213.4(a)(1) cmt. 1, at 368 (1995). Second, as explained in

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("We view the absence of any provision for an affirmative defense in the ICC's credit regulations as an administrative construction of the statute that aids our determination of congressional intent.") (citing *Ford Motor Credit Co.*, 444 U.S. at 565).

[5] Respondent apparently read the references in the petition to the Federal Reserve Board's model forms as an invocation of this statutory defense, which he claims was waived. *See* Opp. 10. But NMAC cited to these forms merely as evidence that the pre-1996 regulation did not in fact require disclosure of residual value in an early-termination clause. *See* Pet. 9.

the petition, the Federal Reserve Board's regulations required lessors to disclose residual value in open-end leases, but made no such requirement for closed-end leases. *See* 12 C.F.R. § 213.4(g)(15) (1995); 61 Fed. Reg. 52,246, 52,251 (1996); App. 28a. This case, therefore, involves more than mere silence on the part of the agency. It involves a failure by the agency to require a particular disclosure in one instance, while the agency at the same time expressly required the same disclosure in other circumstances. NMAC was entitled to rely on this distinction—drawn in the regulations themselves—to conclude that disclosure in the circumstances of this case was unnecessary.

Finally, respondent incorrectly suggests that the legislative history of the CLA supports the court of appeals' holding that "meaningful disclosure" requires disclosure of residual value. Respondent's opposition takes out of context a passage from the Senate Report regarding "miscalculations of residual value." Opp. 8. This passage—which was not cited by the court of appeals—has no bearing on the requirement of "meaningful disclosure" because it is not related to the disclosure requirements at all. Rather, it discusses the CLA's substantive requirement that the residual value in an open-end lease be "reasonable."[6] *See* S. Rep. No. 94-590 (1976), *reprinted in* 1976 U.S.C.C.A.N. 431, 433-34, 436-37. The statutory provision to which the Senate Report refers does not even apply to closed-end leases. Moreover, as the district court correctly observed, "[p]laintiff does not contend here that the residual value used was unreasonable." App. 30a

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[6] 15 U.S.C. § 1667b(a) ("Where the lessee's liability on expiration of a consumer lease is based on the estimated residual value of the property such estimated residual value shall be a reasonable approximation of the anticipated actual fair market value of the property on lease expiration."). The Act also creates a rebuttable presumption of unreasonableness wherever the estimated residual value exceeds the actual residual value by more than three monthly payments. *Id.*

The passage that respondent cites from the Senate Report is thus inapposite.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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